12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 871. 396

JOHN F. DODGE AND HORACE E. DODGE, APPELLANTS,

vs.

WILLIAM H. OSBORN, COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MARCH 15, 1915.

(24,615)

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In the Court of Appeals of the District of Columbia.

No. 2705.

JOHN F. DODGE et al., Appellants,
vs.
WILLIAM H. OSBORN, &c.

a Supreme Court of the District of Columbia.

In Equity. No. 32515.

JOHN F. DODGE and HORACE E. DODGE, Plaintiffs,
vs.
WILLIAM H. OSBORN, Commissioner of Internal Revenue, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Complaint for Injunction.*

Filed March 16, 1914.

Supreme Court of the District of Columbia.

In Equity. No. 32515.

JOHN F. DODGE and HORACE E. DODGE, Plaintiffs,
vs.
WILLIAM H. OSBORN, Commissioner of Internal Revenue, Defendant.

To the Supreme Court of the District of Columbia:

Plaintiffs state as follows:

1. The plaintiffs, John F. Dodge and Horace E. Dodge, are citizens of the United States and residents of the city of Detroit, in the State of Michigan, and are citizens of said State; they are partners in business under the firm name of Dodge Brothers, and they bring this suit in their own right, as individuals and as partners, and in

behalf of themselves, and of all other individuals and partnerships similarly situated and circumstanced.

2. The defendant William H. Osborn is a citizen of the United States and a resident of Washington, in the District of Columbia; he holds the office of Commissioner of Internal Revenue in the Government of the United States, and he is sued in both his official and his individual capacity.

Plaintiffs further state:

I.

That plaintiffs for some years last past have carried on and conducted as copartners, under the firm-name of Dodge Brothers, the business of manufacturing automobile parts, and are now making automobiles of their own modeling, and which will be put on the market during the present year; that they are the only persons interested in said business, and the only persons who are members of the firm, and who share the profits and losses of said business; that they have never had any occasion to become incorporated, either for the purpose of escaping personal liability for the debts of the firm or business, or for the purpose of selling stock and enlisting investments in the business by other persons, and had intended and expected to continue to do business as a partnership for an indefinite period in the future.

II.

That on the 26th day of February, 1914, each of plaintiffs filed with the Collector of Internal Revenue for the First District of Michigan, on blanks furnished by said collector, his return of his net income from March 1, 1913, to December 31, 1913; that the return of plaintiff John F. Dodge is as follows:

3 Gross Income.

1. Total amount derived from salaries, wages, or compensation for personal service of whatever kind or in whatever form paid.....	$62,500.00
3. Total amount derived from rents and from interest on notes, mortgages, and securities.....	251.79
4. Total amount of gains and profits derived from partnership business, whether the same be divided and distributed or not.....	650,888.45
Total	$713,640.24
11. Total amount of income derived from dividends on the stock or from the net earnings of corporations, joint stock companies, associations, or insurance companies, subject to like tax.....	216,941.66
Total gross income.....	$930,581.90

General Deductions.

3. All National, State, county, school, and municipal taxes paid within the year (not including those assessed against local benefits)		$2,077.43

Summary.

1. Gross income		$930,581.90
2. General deductions		2,077.43
3. Net income		$928,504.47

Deductions and exemptions allowed in computing income subject to normal tax of one per cent:

4

4. Dividends and net earnings received or accrued, of corporations, etc., subject to like tax	$216,941.66	
6. Specific exemption of $3,000 or $4,000, as the case may be	3,333.34	
		$220,275.00
7. Taxable income on which the personal tax of one per cent is to be calculated		$708,229.47
Normal tax of one per cent		$7,082.29

III.

That the return of plaintiff Horace E. Dodge is as follows:

Gross Income.

1. Total amount derived from salaries, wages, or compensation for personal service of whatever kind or in whatever form paid	$62,500.00
3. Total amount derived from rents and from interest on notes, mortgages and securities	156.57
4. Total amount of gains and profits derived from partnership business, whether the same be divided and distributed or not	650,888.45
Total	$713,545.02
11. Total amount of income derived from dividends on the stock or from the net earnings of corporations, joint stock companies, associations, or insurance companies, subject to like tax	216,941.66
	$930,486.68

5 General Deductions.

3. All National, State, county, school, and municipal taxes paid within the year (not including those assessed on local benefits)	$968.27

Summary.

1. Gross income	$930,486.68
2. General deductions	968.27
Net income	$929,518.41

Deductions and exemptions allowed in computing income subject to normal tax of one per cent.

4. Dividends and net earnings, received or accrued, of corporations, etc., subject to like tax	$216,941.66	
6. Specific exemption of $3,000 or $4,000, as the case may be	3,333.34	
Total deductions and exemptions		$220,275.00
7. Taxable income on which the normal tax of one per cent is to be calculated		709,243.41
Normal tax of one per cent		7,092.43

IV.

That according to the provisions of subdivision 2, division A, of section 2, of the act of Congress of October 3, 1913, the incomes of individuals in excess of $20,000 are subject to an additional tax, which is graduated according to the amounts thereof; that, applied to the incomes of plaintiffs, this surtax would be computed as follows:

6 Surtax of John F. Dodge.

One per cent on amount over $20,000 and not exceeding $50,000	$300.00
Two per cent on amount over $50,000 and not exceeding $75,000	500.00
Three per cent on amount over $75,000 and not exceeding $100,000	750.00
Four per cent on amount over $100,000 and not exceeding $250,000	6,000.00
Five per cent on amount over $250,000 and not exceeding $500,000	12,500.00
Six per cent on amount over $500,000	12,493.76
Total	**$32,543.76**

Surtax of Horace E. Dodge.

The surtax of plaintiff Horace E. Dodge computed in the same way amounts to $32,604.60.

The total surtax chargeable to plaintiffs is $65,148.36, which is the amount and value involved in this suit, and for the protection of which the jurisdiction of the court is invoked.

V.

That annexed to and filed with the return of each of plaintiffs is a protest signed by them and by their counsel, of which the following is a copy:

Protest.

This protestant is advised by counsel and respectfully submits that the additional taxes levied on individuals by subdivision 2, division A, of the income-tax law are in conflict with the provision of the Fifth Amendment of the Constitution of the United States that no person shall "be deprived of life, liberty or property without due process of law," in that no tax in addition to the normal tax of one per cent is levied or imposed by said law on the net in-
7 comes of corporations, joint-stock companies or associations, or insurance companies, thereby making an invidious, arbitrary and unreasonable discrimination against individuals and natural persons, and in favor of corporations and artificial persons; the tax on the income of corporations being imposed on the privilege of being a corporation, and the tax on individuals being a tax on the right to earn a living and to acquire property, which tax is not within the power granted to the Congress of the United States by sec. VIII, art. 1, cl. 1, of the Federal Constitution "To lay and collect taxes, duties, imposts and excises"; which are required to be not only territorially uniform, but also uniform within and upon all persons and corporations belonging to the same class, and as such class subjected to a tax, duty, impost or excise.

The taxes on incomes imposed by the act of Oct. 3, 1913, are not taxes, duties, imposts, or excise, laid by Congress on the privilege of being a corporation, or on the privilege of inheritance, or on the privilege of earning a living and acquiring property, but are imposed under the authority of the Sixteenth Amendment of the Constitution of the United States on incomes as such from whatever source derived, and even if Congress has power to grade and rate the tax according to the amount of the income it has no power to discriminate between the incomes of natural persons and those of corporations of the same amount or belonging to the same graded class.

For these and other reasons the taxes in addition to the normal tax of one per cent, proposed to be assessed against the net income set forth in the annexed return, are unconstitutional and void, and the undersigned respectfully protests against the same.

Detroit, Feb. 26, 1914.

(Signed by) JOHN F. DODGE.

Another copy:
(Signed by)

HORACE E. DODGE,
By JOHN F. DODGE,
His Attorney-in-Fact.

FRED A. BAKER,
Counsel for Protestant,
526 *Dime Bank Building, Detroit, Mich.*

8 VI.

That subdivision (*a*) of division G, of section 2, of the act of Congress of October 3, 1913, lays the normal tax of one per cent upon the net incomes of corporations, joint-stock companies or associations, and insurance companies (not including partnerships), but does not levy any surtax on net incomes exceeding $20,000.

And the individual stockholders who receive the dividends or net earnings of these corporations are specifically exempted from paying either a normal tax of one per cent or a surtax on the dividends or net earnings received by them.

Division B of section 2 provides that the net income of a taxable person shall include the gains, profits, and income derived from certain enumerated sources, among them, "also from interest, rent, dividends, securities," etc.

But it is further provided:

"That in computing net income for the purpose of the normal tax, there shall be allowed as deductions:

"First," etc. * * *

"Seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint-stock company, association, or insurance company, which is taxable upon its net income as hereinafter provided."

No surtax is directly levied on the income of corporations, and none is indirectly levied, in the tax that is laid on the stockholders as individuals, as far as the dividends actually paid by corporations have been received by them.

VII.

That plaintiffs are informed and believe and charge the fact to be that a very large portion of the taxable incomes under the
9 Sixteenth Amendment consists of the dividends and net earnings of financial, railroad, banking, industrial, and business corporations organized and existing for the purpose of making gains and profits, and there is no apparent reason why the incomes of these artificial persons should not be required to pay the same surtax as that laid on the incomes of natural persons; that these artificial persons do the very same kind of business and conduct their affairs in precisely the same way as individuals and partnerships do, and in open competition with them, often in the same block, or street, or in the same vicinity, or city; and that this condition of affairs exists throughout the United States.

VIII.

Plaintiffs are advised and respectfully submit that the discrimination in the income-tax law in favor of corporations and against individuals is such an unreasonable, unjust, and unwarranted classification for the purposes of taxation as to make the provisions of said act of Congress of October 3, 1913, laying a surtax on the incomes exceeding $20,000 of individuals, including their gains and profits from partnerships, unconstitutional and void, in that said surtax, if enforced and collected, would be

(1) A violation of the provisions of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without compensation;

(2) And further in that the said surtax is not within the power conferred by the Constitution on Congress "To lay and collect taxes, duties, imposts, and excises," and is not within the power conferred on Congress by the Sixteenth Amendment, "to levy and collect taxes on incomes from whatever source derived."

A "tax" that is not apportioned among those who are to pay it, upon some reasonable rule or basis of equality and uniformity, is not within the power of taxation, and is utterly void and wholly without force or effect.

IX.

Plaintiffs are advised that the internal revenue act of July 1, 1862, provided for the appointment of an assessor and a collector in each collection district. The assessor was authorized to divide his district into a convenient number of assessment districts and to appoint an assistant assessor for each of such districts.

Returns were required to be made to these assistant assessors who made a list of the returns and of the assessments thereon. These lists were filed with the assessor, who was required to give public notice of the time and place when he would "hear and determine, in a summary way, according to law and right, upon any and all appeals which may be exhibited against the proceedings of the said assistant assessors."

When the appeals had been determined, lists of the assessments were turned over to the collector of the district for collection (12 U. S. Stat., 433, secs. 2-16).

The act of June 30, 1864, continued the plan of assessments by assistant assessors and appeals to the assessor. It also gave the Commissioner of Internal Revenue power to entertain appeals made to him from the assessments or collections of the local assessors or collectors. The section conferring this authority reads:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, shall be and is hereby authorized on appeal to him made, to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and all duties

that shall appear to be unjustly assessed, or excessive in
11 amount, or in any manner wrongfully collected; also to repay to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them or any of them in any court, for any internal duties or licenses collected by them with costs and expenses of suit; and all damages and costs recovered against assessors, assistant assessors, collectors, deputy collectors, and inspectors, in any suit which shall be brought against them, or any of them, by reason of anything that shall or may be done in the due performance of his official duties, and also compromise such suits and all others relating to internal revenue" (13 U. S. Stat., p. 239, sec. 44).

The act of July 13, 1866, 14 U. S. Stat., p. 111, amended the foregoing section by inserting in lieu thereof the following:

"That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, shall be and is hereby authorized on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that shall appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected, and also repay to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them or any of them in any court, for the internal taxes or licenses collected by them, with the costs and expenses of suits, and all damages and costs recovered against assessors, assistant assessors, collectors, deputy collectors, and inspectors, in any suit which shall be brought against them, or any of them, by reason of anything that shall or may be done in the performance of their official duties," etc.

The act of July 13, 1866, 14 U. S. Stat., p. 152, has this section:

"SEC. 19. No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally
12 assessed or collected, until an appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had thereon, unless such suit shall be brought within six months from the time of such decision, or within six months from the time this act takes effect: Provided, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

This section 19 was amended by act of March 2, 1867, 14 U. S. Stat., p. 475, as follows:

"That section nineteen is hereby amended by adding the following thereto: 'And no suit for the purposes of restraining the assessment or collection of tax shall be maintained in any court.'"

The act of June 6, 1872, 17 U. S. Stat., p. 257, has this section:

"SEC. 14. That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected or any penalty claimed to have been collected without authority or

for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued and not after; and claims for the refunding of any internal tax or penalty shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued and not after: Provided, That actions for claims, which have accrued prior to the passage of this act, shall be commenced in the courts or presented to the Commissioner of Internal Revenue within one year from the date of said passage, and provided further, that where a claim shall be pending before said Commissioner the claimant may bring his action within one year after such decision and not after: And provided further, That no right of action barred by any statute now in force shall be revived by anything herein contained."

13 The foregoing sections are in the Revised Statutes of the United States, editions of 1874 and 1878, as sections 3220, 3224, 3226, 3227, and 3228.

X.

Plaintiffs are further advised that the statutory provisions set forth in the preceding paragraph of this bill have no application to the assessments to be made against them or against any other persons similarly situated and for the following among other reasons:

(1) The act of October 3, 1913, does not authorize or require any local assessor, assistant assessor, or collector, deputy collector, or any other officer to make the original assessments, from which appeals can be made to the Commissioner of Internal Revenue, or to any other officer. Under this act there can be no such thing as an appeal from an original assessment claimed to be erroneous, excessive or illegal.

(2) The act of October 3, 1913, vests the power to make the first and only assessments in the Commissioner of Internal Revenue, and it does not require him to give any personal or public notice to the persons or corporations to be assessed, and it does not fix the time or place when he will hear them and give them an opportunity to show what their assessments should be; and therefore said act in this particular is in conflict with the provisions of the Fifth Amendment of the Constitution of the United States, that no person shall be deprived of life, liberty, or property without due process of law.

XI.

Plaintiffs are further advised that if the statutory provisions set forth in the IX paragraph of this bill are construed to apply
14 to the assessments to be made against them and others similarly situated, then said provisions as so construed and applied are unconstitutional and void, for the following among other reasons:

1. Said provisions recognize the distinction between a suit against the United States and a suit against the officers of the Government

who have assessed or collected an erroneous and illegal tax, and while an aggrieved person is permitted to sue the officer who has compelled him to pay such a tax, and has authorized the Commissioner of Internal Revenue to pay to such officer the amount of any judgment that may have been rendered against him with costs and expenses of suit, said sections do not provide for any adequate relief, as against an unconstitutional assessment which has not been collected and collection of which is threatened.

2. The power of the Commissioner of Internal Revenue to remit taxes which have been erroneously or illegally assessed only applies to cases under the internal revenue laws where the assessments are made by some subordinate officer, and appeals to the Commissioner of Internal Revenue are permitted.

3. The power of the Commissioner of Internal Revenue to remit only applies to taxes which have been erroneously assessed by an officer acting within his jurisdiction, and it does not apply to taxes which are unconstitutional and void and are not within the jurisdiction of the officer making the assessment.

4. While the sovereignty of the people of the United States, as represented by the three departments of the General Government, is such that a suit against the United States cannot be maintained in any court, yet the Congress of the United States has no power to deprive any person of his common-law right of action against such officers of the Government as may impose on him an unconstitutional tax or of his right to equitable relief in cases within the jurisdiction of a court of chancery.

The barons of England compelled King John, in the very same paragraph which secured to them the judgment of their peers or the law of the land, to agree that he would not sell, he would not deny, he would not delay justice and right, which has ever since been a principle of the constitution of England, was supreme law in the English colonies in America, and became and still is a fundamental rule of the constitutional law of the United States of America. The King, as the sovereign, could do no wrong, but his ministers and officers might be guilty of various unconstitutional and illegal things, and actions against them personally have always been permissible.

5. If the statutory provision that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" is held to preclude any equitable or legal relief, except on the condition of first paying the tax, then the said provision is unconstitutional and void, because it amounts to a sale, a denial and a delay of justice and right.

6. There is no statutory provision authorizing the Commissioner of Internal Revenue or any other officer of the Government to refund any tax assessed or collected by an officer which is wholly outside of his official duties and his jurisdiction and authority, such as a tax forbidden by the Constitution of the United States. The judgment of a court or officers within the jurisdiction possessed by them may be erroneous, but not void; but a judgment not within their jurisdiction is utterly void.

7. There is no statutory authority authorizing the payment by the Government of interest on a judgment against an officer, and if there is, the legal rate of interest is no adequate compensation
16 for the irreparable and incomputable damages which would be occasioned by the enforced withdrawal of considerable sums of money from the business of a person or corporation.

8. The Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as may be established by Congress, and the power to grant injunctive relief being essential to and a part of the judicial power, the courts cannot be deprived of the power to issue writs of injunction by any act of Congress.

XII.

Plaintiffs are advised that subdivision 2, of division A, of section 2 of the act of October 3, 1913, after laying a graduated surtax on all individual incomes exceeding $20,000 contains the following provisions:

"Every person subject to this additional tax shall, for the purpose of its assessment and collection, make a personal return of his total net income from all sources, corporate or otherwise, for the preceding calendar year, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.

"For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation, joint-stock company or association is a mere holding company, or the gains and profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a fraudulent purpose to escape such tax; but the
17 fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape said tax in such cases, unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business.

"When requested by the Commissioner of Internal Revenue or any district collector of internal revenue such corporation, joint-stock company or association shall forward to him a correct statement of such profits and the names of the individuals who would be entitled to the same if distributed."

XIII.

Plaintiffs in their said returns set forth the total amount of their net income, corporate or otherwise, received by them for the calendar year 1913; but they are not informed as to the total net income

of the corporation or corporations from which corporate income was derived, or whether any amount more than what was reasonable for the purposes of the business was withheld from distribution, and permitted to accumulate, or whether the Secretary of the Treasury has certified that in his opinion such accumulation is unreasonable for the purposes of the business.

If the corporation or corporations from which plaintiffs received corporate income for the year 1913, withheld any gains and profits or net income in excess of what was reasonable for the purposes of the business, or otherwise, and plaintiffs are required to pay a surtax thereon, they will be compelled to pay a tax on income which they have not received and may never receive.

XIV.

Plaintiffs have been advised that division D, of section 2 of the act of October 3, 1913, contains a provision which reads:

18 "Provided further, That any person carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of a partnership to which any taxable partner would be entitled, if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid, under the provisions of this section; and any such firm, when requested by the Commissioner of Internal Revenue or any district collector, shall forward to him a correct statement of such profits and the names of the individuals who would be entitled to the same if distributed."

There is no provision permitting individuals or partnerships to withhold from taxation a reasonable amount for the purposes and needs of his or its business, and in this regard there is an unreasonable and unwarranted discrimination in favor of corporations and against individuals and partnerships, not within any power of taxation possessed by the Congress of the United States, and in plain violation of the provisions of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without compensation.

In the returns made by plaintiffs no amount of the net income of the partnership known as Dodge Brothers, as reasonably necessary for the purposes of the business of said partnership, was withheld, and if the Commissioner of Internal Revenue when he comes to make his assessments against them, holds that under the law he cannot make any such allowance, as in the case of corporations, then the discrimination in favor of corporations and against partnerships and individuals will be made doubly manifest and the constitutional objections thereto, as above set forth, clear and conclusive.

The stocks held by your orators have always been treated by them as belonging to their partnership business, and the dividends

19 therefrom paid into and constituting a part of the assets of the partnership and as such used in its business, and if the corporations are entitled to withhold from taxation their gains and profits in excess of the dividends paid by them, plaintiffs should not

be taxed thereon, because justly and constitutionally they are entitled to make the very same reservation as reasonably necessary for the purposes of their partnership business.

XV.

Plaintiffs have been informed and believe and charge the fact to be that there are over 300,000 individuals in the United States who have net incomes of more than $3,000 and subject to the normal tax of one per cent, and over 10,000 of them have net incomes exceeding $20,000 and subject to surtax; that there are over 100,000 corporations, joint stock companies or associations, and insurance companies in the United States having net incomes subject to the normal tax of one per cent; that more than 400,000 returns have been made under the law and have been received by or are in transit to the Commissioner of Internal Revenue, the Hon. William H. Osborn, Washington, D. C.; that it is physically and mentally impossible for the Commissioner to examine these returns and make his assessments thereon by June 1, 1914, as he is required to do by the law, and within the same period of time to notify the persons and corporations of the assessments made against them; that no person or corporation will know what his or its assessment is until notified by the Commissioner or by the district collector, and this will be after the assessments are in the hands of the district collectors for collection; that plaintiffs and all other persons similarly situated will not be informed and know the amount of their normal tax of one per cent or the amount of their surtax running from one per cent to six per cent, nor the amount of their tax on the gains and profits and incomes of the corporations in which they hold stock and on which the corporations have withheld from taxation amounts in excess of that which is reasonably necessary for the purposes of the business; that under the income-tax law of October 3, 1913, there is no opportunity to invoke the power of the Commissioner of Internal Revenue under the prior statutory provisions to remit before collection the whole or any portion of the income tax laid and imposed upon persons and corporations, and the only alternative presented is that of paying the tax or running the risk of having "added (to the tax) the sum of five per centum on the amount of tax unpaid, and interest at the rate of one per cent per month upon said tax from the time the same became due."

Plaintiffs submit on behalf of themselves and all others similarly circumstanced that the procedure prescribed by the act of October 3, 1913, is in conflict with the provisions of the Fifth Amendment of the Constitution of the United States, that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without compensation, in that, instead of hearing and condemning before execution, it makes an exaction and executes before judgment, and, like the barbaric justice of olden times, it "hangs and draws in the morning and sits in judgment after."

XVI.

On the 13th day of March, 1914, the plaintiffs, by Fred A. Baker, their counsel and attorney in fact, submitted to the Hon. William H. Osborn, Commissioner of Internal Revenue, at his office in the Treasury building in Washington, a letter, a copy of which is annexed to this bill as Exhibit A thereof; that the copy of protest enclosed in said letter was the same as that set out in the fifth paragraph of this bill; that the Commissioner took up said letter and the requests therein contained in the presence and with the counsel and
21 advice of Hon. Ellis C. Johnson, Solicitor of Internal Revenue, and that thereupon the Commissioner ruled that in obedience to the statutory provisions bearing on the subject he was not authorized to give the plaintiffs or any other persons a preliminary hearing on the amount or validity of any assessment of income tax that may be made against them or on any of the questions suggested and raised in said protest or in said letter of March 13, 1914 (Exhibit A of this bill), and that he could only entertain claims for the abatement or refunding of taxes erroneously or illegally assessed presented in accordance with the statutes and the rules and regulations of the Secretary of the Treasury.

The plaintiffs will not know what their assessments are until the lists containing the same have been forwarded, June 1, 1914, to the Collector of Internal Revenue for the first district of Michigan for collection; that it is distinctly provided by the statutes and rules and regulations that the pendency of a claim for the abatement of a tax shall not operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized, and that he should collect the tax and leave the taxpayer to his remedy by claim.

The rules, regulations, and forms concerning the power of the Commissioner of Internal Revenue to remit and refund internal-revenue taxes, including income taxes, are made a part of this bill, reference thereto for greater certainty being made to the originals in the office of said Commissioner, the official publications thereof, subject to such reference, to be exhibited and used on the hearing of the cause.

XVII.

Plaintiffs file this bill in their own behalf and in behalf of all other persons similarly situated and circumstanced who are not
22 made parties because of the inconvenience arising from their very great number, and from the fact that they are resident in many different States and subdivisions of States throughout the United States, and from the further fact that their names are unknown to plaintiffs and have been disclosed to and are known by the Commissioner of Internal Revenue by the returns filed with him, which are not accessible to plaintiffs.

XVIII.

Plaintiffs, on behalf of themselves and other parties interested, invoke the jurisdiction and powers of the courts of equity of the

United States on the familiar and well-settled ground that the said courts have jurisdiction to prevent a multiplicity of suits, and vexatious and prolonged litigation, and on the further ground that the remedies at the common law and under the statutes of the United States are wholly inadequate and altogether worthless, and on the additional ground that upon the facts and circumstances of this case it is a typical cause for the exercise of the judicial power conferred on courts of equity by the Constitution of the United States. The facts relied on to show jurisdiction are as follows:

There are in the United States more than 10,000 individuals who are each chargeable and assessable with a surtax varying in amount from one to six per centum, and there are more than 10,000 other individuals who own stock in corporations and who are each chargeable and assessable with a surtax on "the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies or associations, however created or organized, formed or fraudulently availed of, for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed." All which surtaxes are to be "levied, assessed and collected," without any notice
23 or opportunity to be heard, by the Commissioner of Internal Revenue, in Washington, D. C., although said surtaxes, as plaintiffs allege, are not within any power of taxation conferred on Congress by the Constitution of the United States or the Sixteenth Amendment and are a violation of the provisions of the Fifth Amendment that no person shall be deprived of life, liberty or property without due process of law and that private property shall not be taken for public use without compensation.

After these taxes have been assessed and collected and the money paid into the Treasury of the United States it will require more than 20,000 suits and judgments to get it out again and restored to those who have been compelled to pay it in, so that, so far as multiplicity of suits is concerned, there can be no doubt about the fact, for there is no authority for a general delivery *of* the Treasury of money collected and turned into it in violation of the Constitution.

The statutory action against an officer who by duress of a distraint of goods and chattels or the sale of real estate has compelled a person to pay taxes illegally levied, has abolished the common-law action (except possibly where the plaintiff expressly withdraws any claim for remuneration from the Government), and the question is whether in the present case the statutory remedy can be regarded as an adequate remedy at law.

Ordinarily the legal rate of interest is the measure of damages for the use of money, but in the case of plaintiffs and others similarly situated it appears, and plaintiffs allege the fact to be, that individuals and partnerships engaged in manufacturing and other industrial enterprises for gains and profits are compelled to use large sums of money as a working fund or capital and to turn the same over many times in a year, and that to be forced to withdraw the same would

work an irreparable injury, for the reason, among others, that it could not be estimated and computed in dollars and cents, although none the less serious and substantial, and this is especially true when
24 applied to a large number of individual and partnership concerns which are to a large extent dependent on each other for a continuance of orders or for the prompt filling of orders that have been accepted.

The withdrawal of large sums of money from manufacturing and industrial enterprises during the uncertain and indefinite periods of time necessary to recover it back must necessarily be very injurious to the business interests of the country.

Each claimant must bring an action against the officer who has compelled him to pay an illegal or unconstitutional tax; the suit must be tried and a judgment rendered for damages and costs, and the judgment so obtained is subject to review in the proper court of last resort. When the judgment has been finally affirmed an exemplified copy of it, and of the record in the case, must be presented to the proper officer, and in some cases must be accompanied with a certificate from the court that the officer who compelled payment had probable cause for doing so; and if a warrant on the Treasury is then refused, an action against the United States must be commenced in the Court of Claims and be prosecuted to final judgment.

Plaintiffs, in behalf of themselves and all others interested, respectfully submit that the statutory action is so vexatiously dilatory and inadequate as to warrant and require an exercise of the jurisdiction of the courts of equity of the United States.

Additional Ground.

Plaintiffs are possessed of large amounts of personal property, consisting of goods and chattels, machinery, tools and appliances, in use, and materials on hand, at their manufacturing plants in the city of Detroit, and the township of Hamtramck in the first collection district of Michigan; and they are also seized and possessed of the parcels of land, and real estate on which their plants are
25 located, and also of other parcels of real estate, situated in the city of Detroit, and the township of Hamtramck, in the first collection district of Michigan; and all of which real and personal estate will be subject to the lien of the United States, under section 3186 of the Revised Statutes of the United States, and to seizure and sale under sections 3187 to 3207.

That the income tax assessments to be made by the Commissioner of Internal Revenue, against the plaintiffs, will be in part valid, and in part unconstitutional and invalid, and, being prima facie good, such assessments will constitute a cloud on the title of the plaintiffs to their said real and personal estate, and for the prevention or removal of which cloud the plaintiffs are entitled to and do hereby invoke the judicial power of the courts of equity of the United States.

Prayer for Relief.

Plaintiffs pray that William H. Osborn, the Commissioner of Internal Revenue, residing and having his office in Washington, D. C., may be made the defendant in this bill of complaint, and that he may be required to answer this bill fully and particularly, paragraph by paragraph, an answer on oath being hereby expressly waived and that relief may be granted as follows:

1. That the income-tax law, contained in the act of Congress of October 3, 1913, may be decreed and declared defective and inoperative for the reason that it provides for the assessment of income taxes without any personal or public notice of the time or place when the individuals and corporations to be assessed will be heard and be given an opportunity to show what their assessments in justice and right ought to be, said income-tax law, being in this particular in conflict with the provision of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty, or property without due process of law.

26 2. That the provisions of subdivision 2 of division A of section 2 of the act of October 3, 1913, providing for the levy, assessment, and collection of an additional tax on the income of individuals exceeding $20,000 may be decreed and declared to be unconstitutional and void for the reason that the discrimination in favor of corporations and against individuals and partnerships, is not within the power conferred on Congress to lay taxes, duties, imposts, and excises or the power conferred by the Sixteenth Amendment to levy taxes on incomes from whatever source derived, and said provisions are in conflict with the provisions of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without compensation.

3. That the provisions of subdivision 2 of division A of section 2 of the act of Congress of October 3, 1913, providing "that for the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed, or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains, and profits, to accumulate instead of being divided or distributed," may be decreed and declared to be unconstitutional and void for the reason that said provisions provide for a farther discrimination in favor of corporations and against individuals and partnerships, which is not within the power conferred on Congress to lay taxes, duties, imposts, and excises, or the power conferred by the Sixteenth Amendment to levy taxes on incomes from whatever *service* derived and said provisions are in conflict with the provisions of the Fifth Amendment of the Con-

27 stitution of the United States that no person shall be deprived of life, liberty, or property without due process of law, and

that private property shall not be taken for public use without compensation.

4. That the provisions of section 2 of the act of Congress of October 3, 1913, which permit corporations, joint-stock companies or associations, to withhold from taxation such portion of their gains and profits as may be reasonably necessary for the needs and purposes of the business, and denies such permission and privilege to individuals and partnerships, may be decreed and declared to be unconstitutional and void for the reason that said provisions provide for a further discrimination in favor of corporations and against individuals and partnerships which is not within the power conferred on Congress to lay taxes, duties, imposts, and excises, or the power conferred by the Sixteenth Amendment to levy taxes on incomes from whatever source derived, and said provisions are in conflict with the provisions of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without compensation.

5. That William H. Osborn, Commissioner of Internal Revenue, the defendant herein, may be temporarily and perpectually enjoined from assessing plaintiffs, or any other individuals or partnerships, with any surtax whatever without first giving them personal notice or substituted service by mail under section 3184, Revised Statutes, of the time and place, when and where they will be given an opportunity to be heard, on the questions whether they are subject to a surtax, and the amount thereof.

6. That William H. Osborn, Commissioner of Internal Revenue, the defendant herein, may be temporarily and perpetually enjoined, even after notice and a hearing, from assessing or collecting
28 any surtax upon or against plaintiffs or any other individuals or partnerships similarly situated or circumstanced.

7. That it may be further decreed and declared that plaintiffs and other individuals and partnerships are entitled to withhold from income taxation such portion of their gains and profits as may be reasonably necessary for the purposes and needs of the business in which they are severally engaged, the same as corporations, joint stock companies, ar associations engaged in the very same kinds of business are permitted to do.

8. That plaintiffs may have such further or other legal or equitable relief in the premises as may be agreeable to equity and good conscience, or law and justice may require.

Prayer for Process.

Plaintiffs pray that process for the appearance of William H. Osborn, the defendant herein, may be issued according to the rules and practice of the court, and that a temporary injunction may be issued out of and under the seal of the court restraining and enjoining the defendant until the further order of the court, as set forth and

prayed in the foregoing prayer for relief, and that on the final hearing of the case said injunction may be made perpetual.

And plaintiffs will ever pray.

JOHN F. DODGE,
HORACE E. DODGE,
Plaintiffs,

By FRED A. BAKER,
Their Counsel and Attorney-in-Fact.

THOS. S. HOPKINS,
Attorney for Plaintiffs.

801 Hibbs Building, Washington, D. C.

FRED A. BAKER,
Of Counsel.

526 Dime Bank Building, Detroit, Mich.

20 DISTRICT OF COLUMBIA, *ss:*

On this 16th day of March, 1914, before me, a notary public, personally appeared Fred A. Baker and made oath that he is the counsel and attorney in fact of John F. Dodge and Horace E. Dodge, the plaintiffs in the within and foregoing bill of complaint; that he has read and knows the contents of said bill and the same is true of his own knowledge, except as to the matters and things therein set forth on information and belief, and as to such matters and things he believes the same to be true.

PEARL V. PHILPITT,
Notary Public, District of Columbia.

My commission expires Nov. 17, 1918.

30 EXHIBIT A.

WASHINGTON, D. C., March 13, 1914.

Hon. William H. Osborn, Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: John F. and Horace E. Dodge, of Detroit, Michigan, partners under the firm name of Dodge Brothers, desire to test before you and the courts the validity of some of the provisions of the income-tax law, enacted by Congress as section 2 of the act of October 3, 1913.

I.

They are advised and contend that the income-tax law is defective and inoperative because it permits the Commissioner of Internal Revenue to make assessments under the law without first giving the individuals and corporations to be assessed notice of the time and place, when and where, they can be heard and be given an opportunity to show what their assessments should be.

They concede that this defect in the law can be cured by the Com-

missioner if he will give the necessary notice by either personal service or substituted service by mail, and they object to any assessments being made without such notice.

As far as their own assessments are concerned they request the Commissioner to fix the time and place they will be given a hearing.

II.

They contend that the provisions of subdivision 2 of division A of section 2 of the act of October 3, 1913, levying an additional tax of from one to six per centum on the net incomes of individuals (including partnership gains and profits) exceeding $20,000 and not providing for such an additional tax on the net incomes of corporations exceeding $20,000, constitute a discrimination in favor of corporations and against individuals and partnerships, which is not within the power of Congress "to lay and collect taxes, duties, imposts, and excises," and is not within the power of Congress
31 under the Sixteenth Amendment "to levy taxes on incomes from whatever source derived," and said provisions of the law are in conflict with the provisions of the Fifth Amendment of the Constitution of the United States, that no person shall "be deprived of life, liberty, or property without due process of law" and that "private property shall not be taken for public use without compensation."

III.

They further contend that the provisions of subdivision 2 of division A of section 2 of the act of October 3, 1913, that "for the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided and distributed, whether divided or distributed, or not, of all corporations, joint stock companies or associations, however created or organized, formed, or fraudulently availed of, for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed," are subject to the same constitutional objections as are the preceding provisions of said subdivision, as more particularly set forth in the above second paragraph of this letter.

IV.

They further contend that the provisions of said subdivision 2, permitting corporations to withhold from taxation under the act such portion of their net gains and profits as may be reasonably necessary for the needs and purposes of the business in which they are engaged, coupled with provisions of division D of said act, which do not permit individuals and partnerships to make a similar reservation from taxation under the act of a portion of their net gains and profits reasonably necessary for the needs and purposes of the business in which they are engaged, is a still further discrimination

in favor of corporations and against individuals and partnerships, which is subject to the same constitutional objections as those set forth in the above second paragraph of this letter.

32 John F. and Horace E. Dodge, in their returns under the law filed February 26, 1914, with the Collector of Internal Revenue for the First District of Michigan, showed a net income for John F. Dodge of $708,228.47 and for Horace E. Dodge of $709,-243.41, on which the normal tax of one per cent amounts to $14,-174.72, and the surtaxes on which, computed at the rates fixed by the act, amount to $65,148.36. That in their said returns they did not carry out the surtax in the columns and blank spaces therefor, but did annex to and file with each of their said returns a protest, a copy of which is herewith enclosed.

They are not informed whether the corporation or corporations from which they received dividends have made gains and profits and earned accrued net income, on which Dodge Brothers would be subject to an additional surtax, and that is one of the questions on which they desire to be heard.

They also wish to be allowed to withhold from taxation under the act such portion of their net incomes as may be reasonably necessary for the needs and purposes of the business in which they are engaged.

They respectfully request an early hearing, and before any assessment is made against them, on all the questions involved in their assessments.

All of which is respectfully submitted.

FRED A. BAKER,
Counsel and Attorney in Fact for
John F. Dodge and Horace E. Dodge.

Address: 526 Dime Bank Building, Detroit, Michigan.

33 *Motion to Dismiss Bill of Complaint.*

Filed April 16, 1914.

* * * * * * *

Now comes the defendant, William H. Osborn, Commissioner of Internal Revenue, by his attorneys, and moves the Court to dismiss the bill of complaint filed in the above-entitled cause, and for grounds thereof says:

1. That the above-entitled cause is a suit brought for the purpose of restraining the assessment and collection of a tax of the United States, and as such cannot be maintained.

2. That it appears upon the face of the bill of complaint that the plaintiffs have a plain, adequate and complete remedy at law.

3. That it does not appear upon the face of the said bill, or the allegations thereof, that the plaintiffs have paid, or tendered, the amount of the taxes due from them to the United States under the Act of October 3, 1913, or even such part as said plaintiffs admit to be due.

4. That the said bill of complaint fails to state facts to make a case cognizable by a court of equity.

5. That it appears upon the face of the said bill of complaint that it is sought by this suit to control and interfere with the Commissioner of Internal Revenue, an executive officer of the United States, in the performance of his official duties, in matters vested solely in his judgment and discretion, and as such cannot be maintained.

6. That it appears upon the face of the said bill that this court has no power to grant the relief prayed for, or any relief whatsoever, as against said defendant.

34

7. That the said bill of complaint, and more particularly the seventh, eighth, ninth, tenth and eleventh paragraphs thereof, is argumentative in form, contains statements and mere conclusions of law, and argumentative and irrelevant matter which the defendant is unable to answer.

8. That the Income Tax Law of October 3, 1913, and each of the provisions referred to in said bill of complaint, are constitutional and valid.

9. And for other reasons appearing of record.

CLARENCE R. WILSON,
United States Attorney, D. C.;
REGINALD S. HUIDEKOPER,
Ass't U. S. Attorney, D. C.,
Attorneys for the Defendant, William H. Osborn, Commissioner of Internal Revenue.

Motion for Restraining Order or Writ of Prohibition.

Filed May 2, 1914.

* * * * * * *

Now, on this day, May 2, 1914, come the plaintiffs and move the Court in virtue of its inherent equity jurisdiction to issue a restraining order, or in virtue of its common law jurisdiction, to issue a writ of prohibition, restraining and prohibiting the defendant, William H. Osborn, as Commissioner of Internal Revenue.

First. From making any assessment of income taxes against the plaintiffs without first giving them notice and a full hearing on the facts and the law on all questions involved in their assessments.

35

Second. From making any assessment against them of the surtax purporting to be levied by the additional tax provisions of subdivision 2 of Division A. of Section II of the Revenue Act of Congress of October 3, 1913.

This motion is based on the bill of complaint in this cause and the motion of the defendant to dismiss the same, and the files and records in the case.

THOS. S. HOPKINS,
Attorney for Plaintiffs.

FRED A. BAKER,
Of Counsel.

To Clarence R. Wilson, United States Attorney, D. C.;
Reginald S. Huidekoper, Ass't U. S. Attorney, D. C.,
Attorneys for the Defendant, William H. Osborn, Commissioner of Internal Revenue.

GENTLEMEN: Please take notice that the above and foregoing motion has been filed and entered in the within entitled cause, and that said motion will be brought on for argument on Thursday the 7th day of May, 1914, at the opening of Court on that day, or as soon thereafter as counsel can be heard.

THOS. S. HOPKINS,
Attorney for Plaintiffs.
FRED A. BAKER,
Of Counsel.

Washington, May 2, 1914.

36 *Decree.*

Filed May 15, 1914.

* * * * * * *

This cause came on to be heard at this term upon the bill of complaint and the motion of the defendant to dismiss the said bill of complaint and upon the motion of the plaintiffs for an injunction and writ of prohibition was argued by Counsel, and being duly considered by the Court it is thereupon, this 15th day of May, A. D. 1914,

Adjudged, Ordered and Decreed that the motion to dismiss the said bill of complaint be, and the same is hereby, granted, and the said bill of complaint be, and the same is hereby, dismissed with costs.

It is further Ordered that the motion of the plaintiffs for an injunction and a writ of prohibition be, and the same is hereby, overruled.

By the Court:

WENDELL P. STAFFORD, *Justice.*

From the above decree, Counsel for the plaintiffs hereby and in open court note an appeal to the Court of Appeals of the District of Columbia, and the bond on appeal is hereby fixed in the sum of $100, or in lieu thereof $50, in cash.

By the Court:

WENDELL P. STAFFORD, *Justice.*

T. S. H.

37 *Memorandum.*

May 16, 1914.—Bond on appeal, $100, approved and filed.

Assignment of Errors.

Filed May 23, 1914.

* * * * * * *

The plaintiffs appealing from the decree dismissing their bill of complaint in this cause say that in the record and proceedings and decree aforesaid there is manifest error as follows:

1. The court erred in dismissing the bill of complaint.

2. The court erred in refusing to grant a restraining order prohibiting the defendant from making any assessment of income tax against the plaintiffs without giving them notice and an opportunity to be heard on all of the questions of fact and law involved in their assessments.

3. The court erred in refusing to grant injunctive relief temporarily and perpetually enjoining the defendant from making any assessments against the plaintiffs of an additional tax on their incomes exceeding $20,000.00.

4. The court erred in refusing to hold that Subdivision 2 of Division A. of section 2 of the Revenue Act of Congress of Oct. 3, 1913 is unconstitutional and void on the ground that the surtaxes imposed by said Subdivision 2 are not within any power of
38 taxation conferred on Congress by the Constitution of the United States and are in violation of the provisions of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty or property without due process of law and that private property shall not be taken for public use without just compensation.

5. The court erred in refusing to hold that the following provision of said Subdivision 2 is unconstitutional:

"In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, and 2 per centum per annum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, 3 per centum per annum upon the amount by which the total net income exceeds $75,000 and does not exceed $100,000, 4 per centum per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $250,000, 5 per centum per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,000, and 6 per centum per annum upon the amount by which the total net income exceeds $500,000."

6. The court erred in refusing to hold that the following provision of said subdivision 2 is unconstitutional:

"For the purpose of this additional tax the taxable income
39 of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distrib-

uted, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed."

7. The court erred in refusing to hold that the following provision of said Subdivision 2 is unconstitutional:

"And the fact that any such corporation, joint-stock company, or association, is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business."

8. The court erred in holding that section 3224 of the Revised Statutes of the United States providing, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" applies to the case of the plaintiffs.

40 9. The court erred in holding that the plaintiffs have an adequate remedy at law and that their case does not come within any of the recognized heads of equity jurisdiction.

10. The court erred in refusing to hold that if said section 3224 was intended to apply to unconstitutional and void tax assessments, it is to the extent of such application unconstitutional and void, because it is an encorachment upon the judicial power vested in the Courts of the United States by section 2 of Articles 3 of the Constitution of the United States, which reads in part "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority."

11. The court erred in refusing to hold that the surtaxes imposed on individual incomes exceeding $20,000.00 are not within the power conferred on Congress by section 8 of Article 1 of the Constitution of the United States "To lay and collect taxes, duties, imposts and excises," or the power conferred on Congress by the Sixteenth Amendment of the Constitution of the United States, "To levy taxes on incomes from whatever source derived."

12. The court erred in holding that it had no jurisdiction.

Wherefore the plaintiffs and appellants pray:

That the said decree dismissing their bill may be reversed and that they may be granted such legal or equitable relief as law and justice may require.

THOS. S. HOPKINS,
Attorney for Plaintiffs and Appellants.

FRED A. BAKER,
Of Counsel.

41 *Designation of Record.*

Filed May 23, 1914.

* * * * * * *

The Clerk will please include in his transcript of appeal to the Court of Appeals in this case the following:

Copy of the Bill of Complaint and exhibits;

Copy of the motion to dismiss by the defendant;

Copy of Plaintiffs' motion for restraining order, or writ of prohibition;

Copy of the Decree of the Court;

Copy of Assignment of Errors;

Memorandum showing appeal bond for costs filed;

Copy of this designation.

THOS. S. HOPKINS,
Attorney for Plaintiffs.

May 23, 1914.

42 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 41, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 32515 in Equity, wherein John F. Dodge and Horace E. Dodge are Plaintiffs and William H. Osborn, Commissioner of Internal Revenue, is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of June, 1914.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2705. John F. Dodge et al., appellants, vs. William H. Osborn, &c. Court of Appeals, District of Columbia. Filed Jun- 15, 1914. Henry W. Hodges, Clerk.

WEDNESDAY, December 9th, A. D. 1914.

No. 2705.

JOHN F. DODGE and HORACE E. DODGE, Appellants,
vs.
WILLIAM H. OSBORN, Commissioner of Internal Revenue.

The argument in the above entitled cause was commenced by Mr. Fred A. Baker, attorney for the appellants, and was continued by Messrs. C. W. Arth and J. E. Laskey, attorneys for the appellee, and was concluded by Mr. Fred A. Baker, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 2705.

JOHN F. DODGE and HORACE E. DODGE, Appellants,
vs.
WILLIAM H. OSBORN, Commissioner of Internal Revenue, Appellee

Opinion.

(Mr. Justice VAN ORSDEL delivered the opinion of the Court.)

Appellants, plaintiffs below, filed a bill in equity in the Supreme Court of the District of Columbia seeking to enjoin the assessment and collection of the surtax imposed upon plaintiffs' incomes under Section II of the Act of Congress, approved October 3, 1913, (38 Stats. L., 166-181), known as the "Income Tax Law."

It is averred that plaintiffs, citizens of Michigan, are partners in business and the only persons interested in the firm; that they filed with the collector of internal revenue their returns showing the taxable income of plaintiff John F. Dodge to be seven hundred and eight thousand, two hundred and twenty-nine dollars and forty-seven cents, and the taxable income of plaintiff Horace E. Dodge to be seven hundred and nine thousand, two hundred and forty-three dollars and forty-one cents, upon which the normal tax of one per cent due from both is computed in the returns to be fourteen thousand, one hundred and seventy-four dollars and seventy-two cents, and that the surtax chargeable under the statute would amount to sixty-five thousand, one hundred and forty-eight dollars and thirty-six cents. To the assessment and collection of the surtax, plaintiffs accompanied their returns with a protest, alleging that the surtax levied upon individuals under Subdivision 2, Division A, of the Income Tax Law is in conflict with the Fifth Amendment to the Constitution of the United States, and that the provision providing for the assessment and collection of the surtax discriminates against individual taxpayers and in favor of corporations. It is further averred that the tax imposed is not uniform, and that no opportunity

is afforded for a hearing before the assessment of the tax; hence, the law is unconstitutional and void. Defendant moved to dismiss the bill on the ground that the suit could not be maintained, since its object is to restrain the assessment and collection of a tax, and that plaintiffs have an adequate and complete remedy at law. On hearing, a decree was entered dismissing the bill, from which this appeal was taken.

The provision of the Income Tax Law directly involved is found in Subdivision 2, of Division A, of Section II, as follows: "In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, and 2 per centum per annum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, 3 per centum per annum upon the amount by which the total net income exceeds $75,000 and does not exceed $100,000, 4 per centum per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $250,000, 5 per centum per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,000, and 6 per centum per annum upon the amount by which the total net income exceeds $500,000."

At the threshold, we are confronted with a question of jurisdiction. The Judicial Code of the United States (Act of Congress of March 3, 1911), sec. 267, provides that: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." Such a remedy at law is afforded the taxpayer for recovering a tax "in any manner wrongfully collected." R. S. U. S., secs. 3220, 3226 and 3227. These provisions are made applicable to the Income Tax Law in Division L of the Act, as follows: "That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this section, are *h*ereby extended and made applicable to all the provisions of this section and to the tax herein imposed."

In England and in this country, the statutes have aimed at assuring the speedy collection of governmental revenues. In order that the revenues to meet the requirements of the Government may be assured, the courts have persistently refused an injunction or other extraordinary process to lend aid to taxpayers in attempts to defeat the collecting agents of the Government. But to make absolute the restriction upon the Federal courts, Congress provided by Section 3224 of the Revised Statutes that: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." While it has been contended that this restriction applies only to taxes improperly or erroneously assessed, the courts have held it to apply to assessments of taxes erroneously or illegally

made under color of authority by the internal revenue officers having general jurisdiction of the subject of the assessment and collection of taxes. Snyder vs. Marks, 109 U. S., 189. The plea of unconstitutionality in the present case grows out of a conceded exercise by the internal revenue officers of official power under color of authority. Indeed, plaintiffs, by making their returns of the normal tax, protesting only against the surtax, conceded the existence of a general authority to assess and collect income taxes.

The case of Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429; 158 U. S., 601, furnishes plaintiffs no relief. In that case, the injunction granted was at the instance of a stockholder of a corporation to prevent the payment of a tax under the Income Tax Law of 1894. Chief Justice Fuller, on the question of jurisdiction, said: "The jurisdiction of a court of equity to prevent any threatened breach of a trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. * * * The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at this stage of the proceedings; and, so far as it was within the power of the Government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action of this defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits."

In Corbus vs. Alaska Treadwell Gold-Mining Co., 99 Fed., 334, the court, referring to the Pollock case, said: "Their (Mr. Justice White and Mr. Justice Harlan's) opinion, with authorities cited, leads me to the conclusion that, had the question of jurisdiction been raised in the court below, and insisted upon in the Supreme Court, the case would not have been heard upon its merits." Mr. Justice Brewer, in delivering the opinion affirming the judgment in this case (187 U. S., 455), said: "The thought suggested by the quotation from the opinion by the district judge impresses us forcibly. Evidently the plaintiff patterned his proceeding upon Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429. But that case does not determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against the corporation, but really for its benefit." The fact, therefore, that in the Pollock case the action was by injunction furnishes no precedent here.

As we have observed, Congress has afforded a complete and adequate remedy at law open to all persons aggrieved by the collection of an erroneous or illegal revenue tax. The taxpayer must pay the tax, and he may then bring an action to recover it back. This, of itself, in the absence of statutory inhibition, would ordinarily be sufficient to warrant a refusal of injunctive relief. It may well be, however, even in the face of this prohibitive statute, that a court of equity would intervene upon a sufficient showing of irreparable damage. "Not only is it the general rule that equity will not restrain the collection of a tax on the mere ground of its illegality, but also, as appears by its legislation, Congress has attempted to enforce that

rule and to require payment of a tax by a party charged therewith before inquiry as to its validity will be permitted. Pacific Steam Whaling Co. vs. United States, 187 U. S., 447. Now before a court of equity will in any way help a party to thwart this intent of Congress, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury. No considerations of mere convenience are sufficient." Corbus vs. Gold Mining Co., 187 U. S. 455.

Plaintiffs, however, have not even alleged that they would suffer irreparable damage. No showing has been made in the bill upon which the court could predicate an inference that such damage would be sustained. Aside from the allegation that the tax will constitute a lien upon their real and personal property, the only ground of damage stated in the bill is "that the income tax assessments to be made by the Commissioner of Internal Revenue, against the plaintiffs, will be in part valid, and in part inconstitutional and invalid, and, being prima facie good, such assessments will constitute a cloud on the title of the plaintiffs to their said real and personal estate, and for the prevention or removal of which cloud the plaintiffs are entitled to and do hereby invoke the judicial power of the courts of equity of the United States." This is not sufficient to warrant equitable relief. We are not convinced that the courts have relaxed or departed from the early rule announced in Snyder vs. Marks, supra, where the court, considering a suit to restrain the collection of a revenue tax on tobacco, said: "The inhibition of section 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. Howland vs. Soule, Deady, 413; Pullan vs. Kinsinger, 2 Abbott U. S., 94; Robbins vs. Freeland, 14 Int. Rev. Rec. 28; Delaware R. R. Co. vs. Prettyman, 17 Id. 99; United States vs. Black, 11 Blatchford, 538, 543; Kissinger vs. Dean, 7 Bissell, 60; United States vs. Pacific Railroad, 4 Dillon, 66, 69; Alkan vs. Bean, 23 Int. Rev. Rec., 351; Kensett vs. Stivers, 18 Blatchford, 397."

Because of the failure of the remedy, it becomes unnecessary to consider the many legal and constitutional objections interposed by plaintiffs to the validity of the Income Tax Law and the procedure under it. All of these objections will be open to plaintiffs in an action to recover the tax.

The decree is affirmed with costs.

Affirmed.

MONDAY, February 1st, A. D. 1915.

No. 2705, January Term, 1915.

JOHN F. DODGE and HORACE E. DODGE, Appellants,
vs.
WILLIAM H. OSBORN, Commissioner of Internal Revenue.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE VAN ORSDEL,
February 1, 1915.

In the Court of Appeals of the District of Columbia.

JOHN F. DODGE and HORACE E. DODGE, Appellants,
vs.
WILLIAM H. OSBORN, Commissioner of Internal Revenue.

The appellants, desiring to appeal from the decision of this Court in this cause, submit the following grounds for said motion, to wit:

I. Because this case involves the construction or application of the Constitution of the United States.

II. Because, this case involves the constitutionality of a law of the United States, to wit: the Act of October 3, 1913, and especially subdivision 2 of Division A of Section 2 of said Act.

III. Because, in this case is drawn in question the validity of an authority, exercised in the United States, to wit: that of the Commissioner of Internal Revenue.

IV. Because, in this case there is drawn in question by the appellants the construction and constitutionality of a law of the United States, to wit: Section 3224 of the Revised Statutes of the United States.

V. Because, in this case is drawn in question by the defendant the construction of a law of the United States, to wit: the Act of Congress known as "The Revenue Act", approved October 3, 1913.

Assigning errors, as required by Section 997 of the Revised Statutes of the United States, the appellants assign, in addition to the five paragraphs already assigned, the following:

VI. The court erred in dismissing the bill of complaint.

VII. The court erred in refusing to grant a restraining order prohibiting the defendant from making any assessment of income tax against the plaintiffs without giving them notice and an opportunity to be heard on all questions of fact and law involved in their assessments.

VIII. The court erred in refusing to grant injunctive relief temporarily and perpetually enjoining the defendant from making any assessments against the plaintiffs of an additional tax on their incomes exceeding $20,000.00.

IX. The court erred in refusing to hold that Subdivision 2 of Division A of Section 2 of the Revenue Act of Congress of October 3, 1913 is unconstitutional and void on the ground that the surtaxes imposed by said Subdivision 2 are not within any power of taxation conferred on Congress by the Constitution of the United States and are in violation of the provisions of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty or property without due process of law and that private property shall not be taken for public use without just compensation.

X. The court erred in refusing to hold that the following provision of said Subdivision 2 is unconstitutional:

"In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, and 2 per centum per annum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, 3 per centum per annum upon the amount by which the total net income exceeds $75,000 and does not exceed $100,000, 4 per centum per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $250,000 per annum, 5 per centum per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,000, and 6 per centum per annum upon the amount by which the total net income exceeds $500,000.00."

XI. The court erred in refusing to hold that the following provision of said Subdivision 2 is unconstitutional:

"For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed or not, of all corporations, joint stock companies, or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed."

XII. The court erred in refusing to hold that the following provision of said Subdivision 2 is unconstitutional:

"And the fact that any such corporation, joint stock company, or association, is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business."

XIII. The court erred in holding that section 3224 of the Revised Statutes of the United States providing, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" applies to the case of the plaintiffs.

XIV. The court erred in holding that the plaintiffs have an adequate remedy at law and that their case does not come within any of the recognized heads of equity jurisdiction.

XV. The court erred in refusing to hold that if said section 3224 was intended to apply to unconstitutional and void tax assessments, it is to the extent of such application unconstitutional and void, because it is an encroachment upon the judicial power vested in the Courts of the United States by section 2 of Article 3 of the Constitution of the United States, which reads in part "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority."

XVI. The court erred in refusing to hold that the surtaxes imposed on individual incomes exceeding $20,000 are not within the power conferred on Congress by section 8 of Article 1 of the Constitution of the United States "To lay and collect taxes, duties, imposts and excises," or the power conferred on Congress by the Sixteenth Amendment of the Constitution of the United States, "To levy taxes on incomes from whatever source derived."

XVII. The court erred in holding that it had no jurisdiction.

Wherefore the appellants desiring to appeal to the Supreme Court of the United States pray the Court to allow such appeal and to fix the penalty of the bond thereon.

THOS. S. HOPKINS,
Attorney for Appellants.

(Endorsed:) No. 2705. John F. Dodge et al., Appellants, vs. William H. Osborn, &c. Petition for allowance of appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Feb. 11, 1915. Henry W. Hodges, Clerk.

TUESDAY, March 2nd, A. D. 1915.

No. 2705.

JOHN F. DODGE and HORACE E. DODGE, Appellants,
vs.
WILLIAM H. OSBORN, Commissioner of Internal Revenue.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said appeal be, and the same is hereby, allowed as prayed. And it is further ordered that the bond for costs on appeal be, and the same is hereby, fixed at the sum of three hundred dollars.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, John F. Dodge and Horace E. Dodge, of Detroit, Michigan, as principals, and The United States Fidelity and Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto William H. Osborn, Commissioner of Internal Revenue, in the full and just sum of Three hundred dollars, to be paid to the said William H. Osborn, Commissioner of Internal Revenue, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of March, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between John F. Dodge and Horace E. Dodge, and said William H. Osborn, Commissioner of Internal Revenue a decree was rendered against the said John F. Dodge and Horace E. Dodge and the said John F. Dodge and Horace E. Dodge having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said William H. Osborn, Commissioner of Internal Revenue citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said John F. Dodge and Horace E. Dodge shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN F. DODGE. [SEAL.]
HORACE E. DODGE. [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By WM. L. SWORMSTEDT, [SEAL.]
Attorney-in-Fact.

[Seal of United States Fidelity and Guaranty Co.]

Sealed and delivered in presence of—
A. L. McMEANS.
T. A. GREER.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2705. John F. Dodge, et al., Appellants, vs. William H. Osborn, Commissioner of Internal Revenue. Bond for costs on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Mar. 10, 1915. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To William H. Osborn, Commissioner of Internal Revenue, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein John F. Dodge and Horace E. Dodge are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 10th day of March, in the year of our Lord one thousand nine hundred and fifteen.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 10th day of March A. D. 1915.
JOHN E. LASKEY,
U. S. Att'y, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 10, 1915. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 41 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John F. Dodge and Horace E. Dodge, Appellants, vs. William H. Osborn, Commissioner of Internal Revenue, No. 2705, January Term, 1915, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 10th day of March A. D. 1915.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[10-cent United States internal-revenue stamp, canceled 3, 12, 15. H. W. H., clerk.]

Endorsed on cover: File No. 24,615. District of Columbia Court of Appeals. Term No. 871. John F. Dodge and Horace E. Dodge, appellants, vs. William H. Osborn, commissioner of internal revenue. Filed March 15th, 1915. File No. 24,615.

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13

Supreme Court of the United States

October Term, 1915.

No. 396.

JOHN F. DODGE AND HORACE E. DODGE,
APPELLANTS,

vs.

WILLIAM H. OSBORN, COMMISSIONER OF
INTERNAL REVENUE.

BRIEF FOR APPELLANTS.

FRED A. BAKER,
Counsel for Appellants.
526 Dime Bank Bldg., Detroit, Mich.

DETROIT:
Record Printing Co., Free Press Bldg., 11-17 Lafayette Boulevard.
1915.

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It was held that the bill could not be sustained because suits to restrain the assessment or collection of any tax are prohibited by Sec. 3224, Rev. Stat. U. S.

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Supreme Court of the United States

October Term, 1915.

No. 396.

JOHN F. DODGE AND HORACE E. DODGE,
Plaintiffs and Appellants,

vs.

WILLIAM H. OSBORN, *Commissioner of Internal Revenue,*
Defendant and Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

John F. Dodge and Horace E. Dodge, brothers, engaged in business as partners under the firm name of Dodge Brothers, filed their bill of complaint in the Supreme Court of the District of Columbia against William H. Osborn, Commissioner of Internal Revenue, in which they prayed that Subdivision 2 of Division A of the Income Tax Law of October 3, 1913, levying an additional tax on the incomes of individuals, might be declared unconstitutional and void, and that the Commissioner of Internal Revenue might be temporarily and perpetually enjoined from making any assessment against them of such additional tax.

The equitable jurisdiction of the court is invoked on three grounds:

1. To prevent multiplicity of suits under the rules of the court permitting bills to be filed in behalf of the plaintiff and all other persons similarly situated and circumstanced.
2. Assessments under the act being in part constitutional and legal, are prima facie valid for the whole amount thereof; and equity has jurisdiction to separate the illegal from the legal, and enjoin the assessment or collection of the illegal.

3. Internal revenue assessments are a lien on the real estate of the persons assessed; and equity has jurisdiction to prevent or remove such liens when they are prima facie valid, but in reality are in part unconstitutional and void.

Facts bringing the case within these recognized heads of equity jurisdiction are carefully set forth and alleged in the XVII. and XVIII. Paragraphs of the bill of complaint. *Record, pp.* 14-16, *fol.* 22-25.

The Supreme Court of the District of Columbia granted a motion to dismiss the bill, and its decree was affirmed by the Court of Appeals of the District of Columbia. *Record, pp.* 23, 31.

An appeal to this court was allowed and perfected. *Record, pp.* 33, 34.

The opinion of the Court of Appeals by Mr. Justice Van Orsdel shows that the decree dismissing the bill was affirmed on the ground that injunctive relief is prohibited by Sec. 3224 of the Rev. Stat. of U. S., and the plaintiffs have an adequate remedy at law. *Record, pp.* 27-30.

> "SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The appellants contend that Sec. 3224 does not apply to cases where the officer making the assessment has no authority or jurisdiction; that an unconstitutional Act of Congress confers no authority or jurisdiction of any kind; and hence in cases where there is a recognized head of equitable jurisdiction, there being no plain adequate and complete remedy at law, an injunction may be issued to enjoin the assessment or collection of an unconstitutional tax.

The question whether the surtax provisions of the income tax law of 1913 are constitutional will be submitted in the case of John F. Dodge and Horace E. Dodge vs. James J. Brady, Collector of Internal Revenue, No. 213, October Term, 1915.

That question was not passed upon by either of the courts below in the case in which this brief is filed, No. 396.

Errors Relied On.

The assignments of error cover the question whether said Subd. 2 of Div. A of the income tax law of Oct. 3, 1913, is constitutional; but as that question will be presented in the other case and was not passed upon in this case by the courts below, this brief will be confined to the assignments relating to the remedy.

VI. The court erred in dismissing the bill of complaint.

VII. The court erred in refusing to grant a restraining order prohibiting the defendant from making any assessment of income tax against the plaintiffs without giving them notice and an opportunity to be heard on all questions of fact and law involved in their assessments.

VIII. The court erred in refusing to grant injunctive relief temporarily and perpetually enjoining the defendant from making any assessments against the plaintiffs of an additional tax on their incomes exceeding $20,000.00.

XIII. The court erred in holding that section 3224 of the Revised Statutes of the United States, providing "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" applies to the case of the plaintiffs.

XIV. The court erred in holding that the plaintiffs have an adequate remedy at law and that their case does not come within any of the recognized heads of equity jurisdiction.

XV. The court erred in refusing to hold that if said section 3224 was intended to apply to unconstitutional and void tax assessments, it is to the extent of such application unconstitutional and void, because it is an encroachment upon the judicial power vested in the Courts of United States by section 2 of Article 3 of the Constitution of the United States, which reads in part, "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority."

XVII. The court erred in holding that it had no jurisdiction.

1.

Sec. 3224 does not apply to cases where the assessing officer has no jurisdiction or authority.

This is a distinction that is fully recognized by the Rev. Stat. of the United States:

> "SEC. 934. All property taken or detained by any officer or other person, *under authority of any revenue law* of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."
>
> "SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for *any act done by him*, or for the recovery of any money exacted by or *paid to him and by him paid into the Treasury*, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."
>
> "SEC. 3210. The gross amount of all taxes and revenues received or collected *by virtue of this Title*, or of any law hereafter enacted providing internal revenue, shall be paid, by the officers receiving or collecting the same, daily into the Treasury of the United States, under the instructions of the Secretary of the Treasury, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses or claims of any description," etc.
>
> "SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected *without authority*, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to

any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done *in the due performance of his official duty,*" etc.

There are three kinds of actions that may be brought against revenue officers of the United States:

1. Actions which are, in effect, actions against the United States, and can only be maintained with their consent.

2. Actions for any act or conduct not within the authority conferred on them by law. Judgments rendered against officers of the revenue, in such cases, will not be paid by the United States, unless the court certifies that there was probable cause for the act done, or that the officer acted under the directions of the Secretary of the Treasury or other proper officer of the Government. Sec. 989 applies to such cases.

3. Actions for any merely erroneous act or conduct within the authority conferred by law and not wholly without authority or jurisdiction. No certificate from the court of probable cause or the direction of an officer of the government is necessary in cases of this class. They are within Sec. 3220.

The distinction between official action which is an unlawful assumption of authority that has not been conferred, and a mistaken, erroneous or irregular exercise of authority actually possessed, was recognized and upheld by the Supreme Court of the United States in the great case of *De Lima vs. Bidwell,* 182 *U. S.,* 1.

That case was a common law action at law to recover duties paid under duress and protest on sugar brought from Porto Rico after the ratification of the treaty of peace with Spain of April 11, 1899.

The action was commenced in a state court and removed to the Circuit Court of the United States, which court held that the complaint did not state a cause of action, and that the court had no jurisdiction of the case.

Counsel for Bidwell, the collector of the port of New York, who had forced the payment of the duties, contended that the case was not within the jurisdiction of the court because the statutory remedy of an appeal to the Board of General Appraisers and thence to the courts, was exclusive.

The court, by Justice Brown, answered that contention by referring to *Elliott vs. Swartwout,* 10 *Pet.* 137; *Cary vs. Curtis,* 3 *How.* 236; *Arnson vs. Murphy,* 109 *U. S.* 238, 240; *Barney vs. Watson,* 92 *U. S.* 349, and then at p. 179 saying:

> "The criticism to be made upon the applicability of these cases is, that they dealt only with *imported* merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification.
>
> "The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him, since Rev. Stat., Sec. 989, provides that, in case of a recovery of any money exacted by him and paid into the Treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the Treasury.
>
> "We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was apprised of the course they would probably take. It is true that in the *Fassett*

Case, 142 *U. S.,* 479, the proceeding was by libel for possession of the vessel, which is analogous to an action of replevin at common law; but it would appear that Rev. Stat., Sec. 934, would stand in the way of such a remedy here, since by that section 'all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.' If the words, 'under authority of any revenue law,' are to be construed as if they read 'under color of any revenue law,' it would seem that these sugars could not be made the subject of a replevin; but even conceding that replevin would lie, we consider it merely a choice of remedies, and that the plaintiffs were at liberty to waive the tort and proceed in assumpsit.

"We are all of opinion that this action was properly brought."

The case of the Dodge Brothers is not different from that of Armstrong and other property owners in *Ogden City vs. Armstrong,* 168 *U. S.,* 224, 240.

In that case a bill in equity was filed to enjoin any assessment of a tax alleged to be illegal. A demurrer to the bill was sustained and the bill dismissed; but on appeal to the Supreme Court of the Territory of Utah the decree of dismissal was reversed, and the case remanded for further proceedings.

In the meantime the assessments were made and some were paid under duress and protest.

A supplemental bill was then filed alleging these additional facts, and praying a decree for the money so paid, and such a decree was granted.

The statutes provided that taxes claimed to be illegal and paid under protest could be recovered in an action at law, and it was objected that they could not be recovered in equity.

Mr. Justice Shiras, delivering the opinion of the court, disposed of that objection as follows:

"Again, it is contended on behalf of the appellant that the defendants cannot recover the taxes paid by

them under protest, because the Session Laws of Utah, 1890, Sec. 1, p. 38, provide that 'any party, feeling aggrieved by any such special tax or assessment or proceeding, may pay said special tax assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall be delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievances and grounds thereof; whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment, to be apportioned by the court as may seem proper, *which remedy shall be exclusive.*'

"As respects this contention, we agree with the Supreme Court of the Territory that this statute applies to cases where there are only errors, irregularities, overvaluations or other defects which are not jurisdictional, but that where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities have no application."

The heads of equity jurisdiction under which the bill as originally filed was sustained will be stated in the Fourth Subdivision of this brief.

The writ of certiorari was used in England at one period to review the proceedings of boards or commissioners created by Act of Parliament. Sometimes Parliament prohibited the writ of certiorari, but the courts ruled that the restriction did not apply where the proceedings to be reviewed were without jurisdiction, or in excess of jurisdiction.

This attracted the attention of Dr. Gneist, the learned German historian, and in his "Constitutional History of England," Vol. 11, p. 369, he says:

"A writ of certiorari is the normal legal method by which a police order that has been issued is sent to the higher court for decision as to whether the administrative act is in accordance with existing law, whether the court is competent and whether the administrative

law has been rightly interpreted. This constitutes in fact a kind of *revisio in jure*. This legal remedy exists as a rule for every oppressed party, where it is not expressly taken away by law. But even where no certiorari is reserved by law it yet remains in force for cases of absolute incompetence and absolute nullity of proceedings. It is also employed in the public interest and can be resorted to by the ministry for the time being, by its attorney general or other legal representatives."

This view of the English law is sustained by *Colonial Bank, etc., vs. Willan L. R.*, 5 *P. C.* 417, which was an appeal from the Supreme Court of Victoria. The power of that court to issue writs of certiorari in cases arising under the Mining statute of 1865, had been taken away by that statute.

Their Lordships held, that the statute did not take away the writ of certiorari in cases where the order reviewed was without jurisdiction appearing on the face of it or it was obtained by fraud or where there was an omission of certain preliminary proceedings, essential to jurisdiction.

Lord Denman, C. J., in *Queen vs. Cheltenham Commissioners*, 1 *Q. B.* 467, 474, said:

"We have already stated our opinion that the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute."

II.

An unconstitutional Act of Congress or of a State Legislature confers no jurisdiction or authority.

It was so held by Chief Justice Marshall in the opinion of the court in the great case of *Osborn vs. Bank,* 9 *Wheat.,* 738, 868.

That was a bill in equity to enjoin State officers from collecting a tax imposed by an unconstitutional act of the Ohio Legislature. After the bill was filed and pending a motion for an injunction, a seizure was made of specie and bank notes belonging to the bank.

A supplemental and amended bill was filed, and at the final hearing a decree was granted that the money seized should be restored to the bank.

Affirming that decree, the Supreme Court of the United States held, among other things:

(1.) That an unconstitutional act could afford no authority or protection to the officers enforcing it.

(2.) That the defendant officers who had made the seizure were all liable in an action at law for the amount of the decree,

(3.) That under the facts surrounding the seizure and the filing of the amended supplemental bill a court of equity had jurisdiction to decree the the restoration of the money.

I quote from the opinion at pp. 868, 869:

> "The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.
>
> "It being then shown, we think, conclusively that the defendants could drive neither authority nor protection from the act which they executed, and that this suit is not against the State of Ohio within the view of the constitution, the State being no party on the

record, the only real question in the cause is, whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants? That this question is attended with great difficulty has not been concealed or denied. But when we reflect that the defendants, Osborne and Harper, are incontestably liable for the full amount of the money taken out of the bank, that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant Sullivan is also responsible for the sum specifically delivered to him, with notice that it was the property of the bank, unless the form of having made an entry on the books of the treasury can countervail the fact that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause *were liable in an action at law for the amount of this decree.* If the original injunction was properly awarded for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. Were it to be admitted that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrongdoer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think, a court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes from putting them into circulation; or a person having the apparent ownership of stock really belonging to another from transferring it. *The suit, then, might be as well sus-*

> *tained in a court of equity as in a court of law*, and the objection that the interests of the State are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued—of sovereignty."

In *Piper vs. Pearson*, 2 *Gray* (*Mass.*), 120, the court, by Bigelow, J., held that inferior judges and magistrates are liable if they act without jurisdiction over the subject-matter, or if, having cognizance of a cause, they are guilty of an excess of jurisdiction.

The same learned judge held that this rule applied in a case where the magistrate acted under an unconstitutional act. *Kelly vs. Bemis*, 4 *Gray* (*Mass.*), 83:

> "The defendant in the present case seeks to justify the tort charged in the declaration by proof that he acted as a magistrate in the performance of certain duties under St. 1852, c. 322, Sec. 14. But that section of the statute has been adjudged to be unconstitutional and void. *Fisher vs. McGirr*, 1 *Gray*, 1. It therefore conferred no authority or jurisdiction upon magistrates. Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the Government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute. He therefore acted without any jurisdiction; and upon familiar and well-settled principles, is liable in this action. *Fisher vs. McGirr*, 1 *Gray*, 45; *Piper vs. Pearson*, 2 *Gray*, 120; *Clark vs. May*, 2 *Gray*, 410."

Turney, J., in delivering the opinion of the court in *Lynn vs. Polk*, 8 *Lea* (*Tenn.*), 121, 129:

> "Whenever the law-making power violates the Constitution, its act is a nullity, and, being a nullity, is not an authority of the State."

Farther on:

> "If the mandates of the Constitution are to be observed, there is not, nor can there be, such thing as

an officer acting by authority of the State in pursuance of an unconstitutional law." * * *

"I am compelled to confess my utter incompetency to comprehend the reasoning upon which it has been holden that unconstitutional enactments may be, or must be, treated as authority of the State. To my mind it is the climax of absurdity."

III.

Congress has no power to prohibit injunctive relief in cases within the recognized heads of equity jurisdiction. The constitution vests "The judicial power of the United States in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

It further provides:

> "The judicial power shall extend to all cases *in law and equity* arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," etc.

An equitable cause of action like a common law cause of action, whether founded in tort or contract, is as much within constitutional guaranties as land or tangible personal property.

An abstract right, without any remedy to maintain or enforce it, is worthless. The legislative authority can regulate remedies, but it cannot abolish all remedy; nor can it put restrictions on a remedy which render it inoperative.

The question whether a new remedy prescribed by the Legislature to take the place of a prior one is efficient and adequate or not has most frequently arisen under the clause of the Constitution that no State shall pass any law impairing the obligation of contracts. Prior to the adoption of the Fourteenth Amendment the due process of law clause was not a federal limitation on the States. Hence in the original constitution it was deemed advisable to insert the clause against the impairment of contracts as a limitation on the States. It was not expressly made a limitation on the general government, but it was included in the due process of

law clause of the Fifth Amendment, which is a limitation on the powers of Congress.

This view of the Constitution was stated with great clearness by Chief Justice Chase near the end of the opinion of the court in *Hepburn vs. Griswold,* 8 *Wall.,* 603.

A common law or an equitable right of action to protect one's property is just as sacred as a right of action on a contract. This principle was the basis of the decision of the court in the great case of *Green vs. Biddle,* 8 *Wheat.,* 1, where Justice Washington, for the court, at p. 75, said:

> "The common law of England was, at that period, as it still is the law of that State; and we are informed by the highest authority that a right to land, by that law, includes the right to enter on it when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it (*Altham's Case,* 8 *Co.,* 299). In *Liford's* case it is laid down that the regress of the disseisee revests the property in him in the fruits or profits of the land, as well those that were produced by the industry of the occupant as those which were the natural production of the land, not only against the disseisor himself, but against his feoffee, lessee, or disseisor; 'for,' says the book, 'the act of my disseisor may alter my action, but cannot take away my action, property or right; so that after the regress the disseisee may seize these fruits, though removed from the land, and the only remedy of the disseisor, in such case, is to recoup their value against the claim of damages.' The doctrine laid down in this case, that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of *Holcomb vs. Rawlyns* (*Cro. Eliz.,* 540). (See also *Bull N. P.,* 87.)
>
> "Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to and interest in the property. If there be no remedy

> to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged; but it is impaired, and rendered insecure, according to the nature and extent of such restrictions."

That case involved the validity of restrictions on actions for the possession of land and the recovery of its rents and profits while in possession of a disseisor.

It was pointed out that the possession and the right to the rents and profits *is the land,* as without these the mere title would be without value.

It was shown that a contract between the States of Virginia and Kentucky was impaired; but if the due process of law clause had been in force as a federal limitation on the States, and there had been no contract, the result would have been the same.

A Michigan statute restricted the damages recoverable in actions against newspapers for libels published by them to such actual damages as the plaintiff could show he had suffered in respect to his property, business, trade, profession or occupation, *and no other damages.*

Held unconstitutional in an opinion by Campbell, J. *Park vs. Free Press Co., 72 Mich.,* 560, 566, wherein it was said:

> "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief. And, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has, therefore, always drawn distinctions between intentionally false and wicked assaults on character and those which were not actually designed to create a false impression, although necessarily tending to injure reputation if false in fact, but it has made both actionable."

The right to an injunction in cases within the jurisdiction of a court of equity is a constitutional right, which cannot be destroyed or seriously impaired by any act of Congress.

IV.

The case of the plaintiffs is within recognized grounds of equitable jurisdiction.

The Commissioner of Internal Revenue makes the assessments, and for each collection district he makes a list of the persons assessed, with the aggregate amount assessed against each. This list is forwarded to the collector for collection, and is the warrant under which he is authorized to act. Being valid on its face, especially in cases like the present, where a part of the aggregate sum assessed, viz: the normal tax, is valid, the illegality of the whole or of a part of the tax can only be shown by extrinsic evidence.

This being the case, equity has jurisdiction.

The income tax law, Division L, adopts by reference all of the provisions of the general laws relative to internal taxes. Sec. 3186, Rev. Stat., as amended 20 U. S. Stat., 331, Ch. 125, Sec. 3, makes the tax a lien on real estate from the time when the assessment list is received by the collector.

Being a lien on real estate, and the illegality of the tax not appearing on the face of the record, equity has jurisdiction to prevent the lien from attaching to the land, or, if it has attached, to remove it.

These grounds for equitable jurisdiction are sustained by *Ogden City vs. Armstrong,* 168 *U. S.,* 224; and *Wilson vs. Lambert,* 168 *U. S.,* 611, and other cases in this court.

In *Ogden City vs. Armstrong,* 168 *U. S.,* 224, it was held (1) that in order to justify a court of equity in restraining the collection of a tax circumstances must exist bringing the case under some recognized head of equity jurisdiction; (2) that when the illegality or fatal defect in a tax does not appear on the face of the record, courts of equity regard the case as coming within their jurisdiction; and (3) that if a tax is a lien upon lands, and the illegality or fatal defect

does not appear on the face of the record, but must be shown by evidence *aliunde,* courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on title existed or was imminent, citing *Dows vs. Chicago,* 11 *Wal.,* 198; *Hannewinkle vs. Georgetown,* 15 *Wall.,* 547.

In *Wilson vs. Lambert,* 168 *U. S.,* 611, it was held that courts of equity have jurisdiction to hear the complaint of those who assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of an act of Congress which has been enacted under the forms of law, but which, it is claimed, is unconstitutional, and therefore does not avail to confer the powers sought to be exercised.

Other cases:

Cummins vs. Merchants' Nat. Bank, 101 *U. S.,* 153.
Hills vs. National Bank, 105 *U. S.,* 319.
Stanley vs. Albany County, 121 *U. S.,* 535.
Fargo vs. Hart, 193 *U. S.,* 490.
Raymond vs. Chicago, etc., Co., 207 *U. S.,* 20.
West. Union vs. Andrews, 216 *U. S.* 165.

Restraining order was granted by Supreme Court of the United States in an appeal testing the constitutionality of an act of Congress.

Journal of Commerce, etc., vs. Burleson, 229 *U. S.,* 600.

In *Vesta Mills vs. City Council,* 60 *S. C.,* 1, the apparent lien of the city for taxes on property that was exempt from taxation was held to be ground for a perpetual injunction against the collection of the tax.

The income tax law of October 3, 1913, exempts certain corporations not organized for gains and profits, but suppose the Commissioner of Internal Revenue should make an assessment against such a corporation, would it not be a case calling for equitable relief by injunction?

Dows vs. Chicago, 11 *Wall.,* 108, is a case where a bill was filed to restrain the collection of a tax on the sole ground that the tax was illegal. No facts were alleged bringing the case

within the jurisdiction of a court of equity. In disposing of the case Justice Field, for the court, said:

> "It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud on the title of the complainant."

Union Pacific Ry. vs. Cheyenne, 113 *U. S.,* 516, is a case where the illegal tax was a lien on real estate, and the court held that equity had jurisdiction and the complainant was entitled to an injunction.

Shelton vs. Platt, 139 *U. S.,* 591, was a case where a bill was filed to restrain the collection of a tax by a distraint of personal property. There was no allegation that the complainant had any real estate, or that the complainant was without means to pay, and equity jurisdiction was denied. What Chief Justice Fuller, for the court, said had reference to a seizure of personal property.

In the recent *Ohio Tax Cases,* 232 *U. S.,* 576, 587, Mr. Justice Pitney, for the court, said:

> "The right to invoke the equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by bringing these actions (§117 of Act; §5506 Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the act. *Shelton vs. Platt,* 139 *U. S.,* 591, 598; *Ex parte Young,* 209 *U. S.,* 123."

A bill in equity can be maintained to prevent a cloud on real estate as well as to remove a cloud. *Rogers vs. Nichols,* 186 *Mass.,* 440. citing *Stevens vs. Mulligan,* 167 *Mass.,* 84, 86; *Loring vs. Hildreth,* 170 *Mass.,* 328, 331; *White vs. Gove,* 183, *Mass.,* 333, 339.

In the last named case the lien removed was a tax deed issued under an unconstitutional tax law.

V.

Sections 989 and 3220 of the Revised Statutes do not authorize persons contesting the validity of an internal tax to invoke any action, either at law or in equity. They do nothing more than recognize the law as settled by the Supreme Court of the United States, that the United States can not be sued without their consent; and that the only remedies are those actions at law or in equity which may be brought against the officers and servants of the Government.

To show what those actions are, I wish to recall a chapter of constitutional history.

The Constitution of the United States does not say that the United States may not be sued, and, as originally framed and adopted, it did not say that a State could not be sued without its consent. The Constitution did say that the judicial power of the United States should extend to all cases in law or equity arising under the constitution, laws or treaties of the United States, and certain other enumerated cases, including cases to which the United States shall be a party or between a State and citizens of another State.

One of the objections to the constitution was that a State might be sued by the citizens of another State, but Hamilton, Madison and Marshall contended that the sovereignty of the States was of such a nature that they could not be sued without their consent.

The Supreme Court of the United States was of a contrary opinion when the question came before it in the great case of *Chisholm vs. Georgia, 2 Dall.,* 419.

The constitution gives the Supreme Court original jurisdiction in cases in which a State is a party, and Edmund Randolph, then Attorney General of the United States, as counsel for the plaintiff, commenced an action in the name of a citizen of the State of South Carolina against the State of Georgia, caused process to be served on the Governor and Attorney General, and moved the court for an order that the State of Georgia appear in the case by a certain date or show cause to the contrary, and if not, that a judgment be entered.

Ingersoll & Dallas, counsel for Georgia, presented a remonstrance to the court, but, under positive instructions, declined making an argument. Randolph then made an argument which is quite fully set forth in the report.

The court took the motion under advisement and subsequently delivered their opinions *seriatim*.

Chief Justice Jay and Justices Blair, Wilson and Cushing held that a State could be sued by a citizen of another State.

Justice Iredell dissented.

All of the four concurring judges held that the words of the constitution, that the judicial power of the United States shall extend "to controversies between a State and citizens of another State," and that the Supreme Court of the United States shall have original jurisdiction in all cases "in which a State shall be a party," mean what they say; that the parties to a controversy or a case are the plaintiff and the defendant; that if a State could be a plaintiff it could be a defendant; and that there was no warrant in the constitution for holding that the jurisdiction of the court was limited to cases in which a State was the party plaintiff.

Justice Iredell held to the English doctrine, that a claim against the Crown could only be prosecuted by a petition of right to the King in person, and no action could be maintained in the courts except by consent of the King.

Randolph, according to Iredell, on the argument, contended that the same rule did not apply to the United States, and two of the justices suggested—but did not hold—that the words of the constitution, "to controversies in which the United States shall be a party," might require a different construction.

Inasmuch as the United States could be a party defendant as well as a party plaintiff, there is but little ground for such a distinction. Process could be served on the President and the Attorney General as readily as on the Governor and Attorney General of a State.

No one can read the very learned and able opinion of Justice Wilson, who had been a member of the Federal convention, without feeling that under a true construction of the

constitution the United States may be sued in the Federal courts as the defendants in a case. But, unfortunately, that view was not accepted.

The decision of the Supreme Court of the United States, that a State could be sued in that court by citizens of other States, caused great alarm in the States, most of which were heavily in debt, and were disposed to repudiate or to take their own time in responding to their obligations. As a result of the agitation the Eleventh Amendment was proposed and adopted:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

The words "be construed to" were not in the amendment as originally introduced in Congress, but were inserted to give the amendment a retroactive effect as to actions that had been commenced and were then pending in the court. The pending suits were dismissed. *Hollingsworth vs. Virginia,* 3 *Dall.,* 378.

The Eleventh Amendment having been adopted giving the States immunity from suits without their consent, the court could hardly be expected to withhold the same immunity from the United States.

The English doctrine having been adopted as far as the States are concerned, it was a natural sequence that it would also be applied to the United States. The words "where the United States shall be a party" only apply to cases where the United States are the party plaintiff. That is a narrow construction, which should never have been accepted, but it is beyond correction now.

Justice Wilson, in his opinion in *Chisholm vs. Georgia,* makes it very plain that the non-suability of the sovereign is a remnant of the feudal system, and never should have obtained any foothold in the United States.

The grounds on which it was held to be in force in this country were set forth with great learning by the Supreme Court of Massachusetts, speaking by Justice Gray in *Briggs vs. Light Boats,* 11 *Allen,* 162.

Chief Justice Marshall had, before the constitution was ratified, expressed the opinion that the sovereignty of the States was such that they could not be sued without their consent, and when he became chief justice he conceded the general proposition that a sovereign independent State is not suable without its own consent; and he said: "The universally received opinion is that no suit can be commenced or prosecuted against the United States."

That view, borrowed from the feudal conception of the Kings of England as the fountain of justice and incapable of doing wrong, continues to be the legal theory in the United Kingdom; but it has been almost completely broken down by statutory enactments and court decisions.

It took many centuries to establish as a fact the doctrine that every person in Great Britain, from the King to the lowest individual, is subject to the law of the land. The maxim that the King can do no wrong still prevails, and no suit against the Crown can be maintained except under the statute (23 and 24 Vict. 34) permitting petitions of right to be filed with the Home Secretary, who takes the opinion of the Attorney General and consults any Department of State affected by the claim. If the opinion of the Attorney General is favorable, the petition is submitted for royal endorsement of the fiat, "let right be done." The petition is then sent to the Department concerned that a plea or answer may be returned in twenty-eight days, and the subsequent proceedings follow the course of any ordinary civil action in the courts. (2 *Anson's Law and Custom of the Constitution, p.* 231.)

This remedy has been held to extend to cases of property wrongfully taken or withheld and to damages, liquidated or unliquidated, for breach of contract; but it does not extend to cases of wrong alleged to have been done by the King or his servants acting on his behalf. (*Id., p.* 475.)

Except in the cases mentioned, there is no such thing in England as a suit against the Crown; but it does not follow that persons injured by the wrongful and illegal action of the servants and officers of the Crown have no remedy. They have an indirect way of subjecting the Crown to the law.

After showing that one or more Ministers must take part in any act of the Crown, Dicey in his "The Law of the Constitution," written from the legal standpoint, at pp. 320, 321, says:

"The Minister or servant of the Crown who thus takes part in giving expression to the Royal will is legally responsible for the act in which he is concerned and he cannot get rid of his liability by pleading that he acted in obedience to Royal orders. Now supposing that the act done is illegal, the Minister concerned in it becomes at once liable to criminal or civil proceedings in a Court of Law. In some instances, it is true, the only legal mode in which his offense could be reached may be an impeachment. But an impeachment itself is a regular though unusual mode of legal procedure before a recognized tribunal, namely, the High Court of Parliament. Impeachments indeed may, though one took place as late as 1805, be thought now obsolete, but the cause why this mode of enforcing Ministerial responsibility is almost out of date is *partly* that Ministers are now rarely in a position where there is even a temptation to commit the sort of crimes for which impeachment is an appropriate remedy, and *partly* that the result aimed at by impeachment could now in many cases be better obtained by proceedings before an ordinary Court. The point, however, which should never be forgotten is this: it is now well established that the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State, or the Lord Chancellor, who thereby becomes not only morally but legally responsible for the legality of the act in which he takes part. Hence indirectly but surely the action of every servant of the Crown, and therefore in effect of the Crown itself, is brought under the supremacy of the law of the land."

Anson, Vol. 11, p. 477, says:

"As regards wrong, no servant of the Crown may set up as defense to a wrongful act the express orders of the Crown or orders implied by the allegation that what he did was an act of State. The case of *Entick vs. Carrington* (19 *St. Trials* 1030) contains words which more than a hundred years old will meet every case of this character:

> "'With respect to the argument of state necessity or a distinction that has been aimed at between state offences and others, the common law

> does not understand that kind of reasoning nor do our books take notice of any such distinction.' "

The other cases are *Leach vs. Money, Wilkes vs. Wood* and *Wilkes vs. Lord Halifax,* 19 *St. Trials,* 1001, 1150, 1406.

These cases established the personal liability of the officers and servants of the Crown for any illegal act on their part.

The only exceptions are the Lord Lieutenant of Ireland and the Governor-General of India, who are regarded as viceroys, whose offices are of such a regal nature as to come within the maxim that the King can do no wrong.

There is no such thing as an exemption from personal liability for acts of State as between the officers and servants of the Crown and British subjects. Acts of State exempting from liability can only be committed against the subjects of foreign powers. 2 *Stephens' His. Crim. Law,* 61.

The cases above cited were decided some ten years before the American Revolution began. They were not based on any statutory provisions, but were expositions of the common law and of that very kind of common law which the English colonists brought with them when they migrated to America and which was expressly declared by the colonial charters, grants and royal commissions constituting the constitutions of the several colonies.

Referring to the liability of officers for wrongful acts on their part, James Bryce, in his "American Commonwealth," Vol. 1, p. 239, says:

> "The same principle applies to acts done by an executive officer beyond the scope of his legal authority. In free countries an individual citizen is justified in disobeying the orders of a magistrate if he *correctly* thinks these orders be in excess of the magistrate's legal power, because in that case they are not really the orders of a magistrate but of a private person affecting to act as a magistrate."
>
> "In England, for instance, if a Secretary of State or a police constable does any act which the citizen affected by it *rightly* deems unwarranted, the citizen may resist, by force if necessary, relying on the ordinary courts of the land to sustain him. *This is a consequence of the English doctrine that all executive*

power is strictly limited by the law, and is indeed a cornerstone of English liberty."

The same beneficent result has been reached in this country and in the same way.

Congress has created a Court of Claims, which has jurisdiction of all claims founded upon the Constitution of the United States, or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable. *Judicial Code, Sec.* 145.

And our courts from an early date have held the officers and servants of the United States, or of a state to a strict personal liability for any illegal or wrongful conduct on their part. *United States vs. Peters,* 5 *Cranch,* 115; *Meigs vs. McClung,* 9 *Cranch,* 11.

The leading case on the question is that of *Osborne vs. Bank,* 9 *Wheat,* 738, 868, the opinion of the court being by Chief Justice Marshall.

Another great case is *Lee vs. United States,* 106 *U. S.,* 196.

In that case the United States had purchased the estate of the Lee family at Arlington at an illegal tax sale and the government by its officers and servants was in possession. George Washington Parke Custis Lee brought an action of ejectment against the officers having actual possession. The United States objected to the jurisdiction of the court and in that way only became a party to the suit.

The Supreme Court of the United States, five to four, held that the action was maintainable and affirmed a judgment in the court below in favor of the plaintiff. Both opinions are very learned and interesting. The conflict between them arose from the fact that it was an action for the possession of land, and the four dissenting judges thought it was a suit against the United States and as such not maintainable. The majority opinion examines the doctrine that a sovereign state cannot be sued without its consent with great care and confines the immunity to narrow limits, and reaches the con-

clusion that it was not a suit against the United States. Neither opinion has much to say concerning the liability of the officers and servants of the United States for unconstitutional or otherwise illegal acts committed by them.

In the subsequent case of *Cunningham vs. Macon & Brunswick R. Co.*, 109 *U. S.*, 446, Justices Harlan and Field, dissenting from the opinion of the Court by Justice Miller, were of the opinion that the Court was making a departure from *Lee vs. United States.*

Whether that was so, is not important in our present inquiry, but it shows that we are justified in relying on rules of law as to which the two opinions are in accord with each other.

Justice Miller, distinguishing cases for the possession of property from ordinary civil actions, says:

> "In actions at law, of which mandamus is one, where an individual is sued as for injuries to person or to property, real or personal, or in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant he must show it to the Court and abide the result. In either case the State is not bound by the judgment of the Court and generally its rights remain unaffected. It is no answer for the defendant to say: 'I am an officer of the government and acted under its authority,' *unless he shows the sufficiency of that authority.*"

In other words, the authority under which the officers and servants of the government defend must be a constitutional and valid grant of power, and as an unconstitutional act of Congress confers no authority a suit against the officers and servants who seek to exercise power under it is not a suit against the United States.

VI.

It is beyond the power of Congress to say that an unconstitutional tax must be collected or be paid under protest, before any suit can be maintained to test its validity.

If Congress has any such power it can resort to forced loans.

Forced loans were called "benevolences" on the theory that they were voluntary, though in fact extorted by the king from his richer subjects. They became in the reign of Edward V. (1461-1483) a very great grievance, and were abolished in the only parliament of Richard III, but he was regarded as a usurper, and the statute was ignored for nearly a century and a half. The commons did not approve of benevolences, except in the pusillanimous parliaments of Henry VIII, when acts were passed releasing the King from all the debts he had contracted, "by way of trust or loan, either upon any letter or letters under the King's privy seal, general or particular, letter missive, promise, bond, or obligation of repayment, or by any taxation or other assessing by virtue of any commission or commissions, or by any other means, whatever it be, heretofore passed for that purpose."

There is no doubt about the compulsory character of the exactions called benevolences.

Commissioners were sent into the counties and cities with directions to incite all men to a loving contribution according to the rates of their substance, except those whose lands were of a less annual value of 40s. or whose chattels were less than £15.

If any person withstood the solicitations of the commissioners, he was summoned before the privy council, and if he still stood out, would be either imprisoned or perhaps, as in the case of Reed, a London alderman, sent to the army and employed in the hardest and most perilous duty, and in garrison subjected to the greatest privations.

One of the early events of constitutional importance in the reign of Charles I was the imprisonment of five knights for refusing to obey privy seals for forced loans to

the King. The warrant was signed by the Attorney-General and stated that they were "committed by the special command of his majesty."

These arrests were a violation of Magna Carta, the statutes Confirmationes Chartarum, and De Tallagio Concendendo, and every other statute of a constitutional nature in the history of England, and for two reasons: (1) the forced loans were exacted without the consent of Parliament, and (2) no cause was set forth in the warrant.

Sir Thomas Darnel, one of the imprisoned knights, sued out a writ of *habeas corpus* in the King's Bench. It had been the rule that where an insufficient cause of imprisonment was expressed in the warrant, to discharge the prisoner, but if no cause was expressed the prisoner was remanded. This rule was followed and Darnel was remanded.

Not long afterwards parliament met, and the debate and proceedings began, resulting in the Petition of Right, which expressly provides:

> "That no man of what estate or condition that he be should be put out of lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought to answer by due process of law.
>
> "That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge without common consent in parliament."

The statesmen who framed our first American constitutions were very familiar with the history of England under the Stuart dynasty, and the most momentous thing they did was to accept and adopt these provisions of the Petition of Right as a perpetual and eternal monument to their sagacity and wisdom.

The compulsory collection of an unconstitutional tax is a deprivation of property without due process of law, and also a taking of private property for public use without compensation.

The history of the royal prerogative of purveyance from Magna Carta, chapters 28, 29, 30, 31 (*McKechnie's Magna Carta*, pp. 385-393), furnishes another illustration of what was sought by the constitutional provision that private prop-

erty shall not be taken for public use without just compensation.

No person can be compelled to loan money to the Government, and that is what compelling payment of an unconstitutional tax and permitting the victim to sue the United States, in the person of the collector, to get his money back, amounts to; it is nothing more or less, and there is no way of disguising or explaining this fact.

VII.

The Supreme Court of the United States has never held that in cases within any of recognized heads of equity jurisdiction, an injunction could not issue to restrain the assessment or collection of an unconstitutional internal revenue tax; and until the decisions of the courts below in the present case, no circuit or district court of the United States had made such a ruling.

The cases in this court were reviewed in the opinion of the court by Justice Moody in *Boise Artesian Water Co. vs. Boise City*, 213 *U. S.*, 276, and he makes it very plain that if an injunction is prayed upon no other reason than the illegality or unconstitutionality of the tax or imposition, it will not be granted; but if there are conditions and circumstances existing, (and they are properly set up and alleged by the plaintiff) bringing the case under some recognized head of equity jurisdiction, an injunction will be granted.

It is a curious and significant fact that in each of the cases in which the courts have refused injunctive relief to restrain the assessment or collection of an unconstitutional federal tax, there was no allegation that the complaining party owned any real property on which the tax would be prima facie a valid lien, and no attention was called to Sec. 3186 Rev. Stat. *Robbins vs. Freeland*, 14 *Int. Rev., Rec.* 28; *Moore vs. Miller*, 5 *D. C. Appeal Cases*, 413.

Sec. 3186 as amended by Sec. 3 of Act of Mar. 1, 1879, (20 U. S. Stat. 329) reads:

> "If any person liable to pay any tax neglects or refused to pay the same after demand, the amount shall

> be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, *upon all property and rights to property belonging to such person.*"

United States vs. Snyder, 149 *U. S.* 210, is a case where such a lien on real estate was sustained and enforced.

The only case in which equity jurisdiction was properly invoked to defeat an unconstitutional act of Congress is *Lambert vs. Wilson,* 168 *U. S.* 612, and in that case the jurisdiction to grant injunctive relief was sustained. The opinion of the court by Justice Shiras commences with these paragraphs:

> "Courts of equity undoubtedly have jurisdiction to hear the complaints of those who assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which is unconstitutional, and therefore does not avail to confer the powers sought to be exercised. *Dows vs. Chicago,* 11 *Wall,* 108; *Union Pac. Railway vs. Cheyenne,* 113 *U. S.,* 516; *Ogden City vs. Armstrong,* 168 *U. S.,* 224; *Dillon's Mun. Corporations, Vol.* 2, § 922, 4th ed.
>
> "Accordingly, if in the present case, the sixth section of the act of September 27, 1890, entitled, 'An Act authorizing the establishment of a public park in the District of Columbia,' and upon which the defendants rely for their authority to act, is, indeed, unconstitutional and void for any or all of the reasons urged against it, we think that the complainants are entitled to a remedy by a direct proceeding in a court of equity. For the reasons mentioned in the cases above cited and in numerous others, the remedy at law could not be regarded as plain and adequate."

Moore vs. Miller, 5 *D. C. Appeal Cases,* 413, was appealed to the Supreme Court of the United States, and was argued with the Pollock case by Mr. George F. Edmunds for Moore, and his argument is reported in the report of the Pollock case, 157 *U. S.* 482-499.

It was not decided, 163 *U. S.* 696.

The bill in the Pollock case alleged that the Farmers Loan and Trust Company owned real estate; but that company

did not file a cross-bill as it might have done praying relief from the lien on its real estate; and the dissenting opinion of White and Harlan, J. J., on the question of remedy (pp. 608-611) has reference to cases in which the unconstitutionality of the tax was the only ground for injunctive relief, with no allegations bringing the suits within a recognized head of equity jurisdiction, as in *Wilson vs. Lambert*, 168 *U. S.* 611.

For the same reason all the cases cited by Mr. Justice Orsdell in the court below (*Record, pp.* 29, 30) are distinguishable from the case of Dodge Brothers as presented by their bill of complaint. The Supreme Court of the District of Columbia should have entertained the case and passed upon the constitutional objections to the surtax provisions of income tax law of 1913.

FRED A. BAKER,
Counsel for Appellants.

Supreme Court of the United States

October Term, 1915.

No. 396.

JOHN F. DODGE AND HORACE E. DODGE,
PLAINTIFFS AND APPELLANTS,

VS.

WILLIAM H. OSBORN, COMMISSIONER OF INTERNAL REVENUE.
DEFENDANT AND APPELLEE.

ADDITIONAL BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATEMENT.

Before receiving the motion of the Solicitor-General to dismiss the appeal in this cause or to affirm the decree of the Court below, the counsel for the appellants had filed and served a "Brief for Appellants" which anticipates the objections on which the Solicitor-General relies; but I wish to add thereto the following:

I.

There can be no doubt about the jurisdiction, in this cause, of the Supreme Court of the United States, under the First, Third and Fifth clauses of Sec. 250 of the Judicial Code. The constitutionality and construction of Subdivision 2 of Division A of Section II. of the Revenue Act of Congress of October 3rd, 1913, is involved; also the construction and ap-

plication of Sec. 3224 of the Revised Statutes of the United States; also the jurisdiction of the Supreme Court of the District of Columbia; and also the validity of an authority exercised under the United States by the Commissioner of Internal Revenue, and the existence and scope of his power or duty as an officer of the United States.

United States vs. Antikamnia Chemical Co., 231 *U. S.*, 654.
Steinmetz vs. Allen, 192 *U. S.* 543.
Parsons vs. District of Columbia, 170 *U. S.*, 45.

II.

The questions raised are not so frivolous and devoid of merit as to justify a dismissal under the ruling in *Brown vs. Lane*, 232 *U. S.*, 598, *and Consolidated Turnpike Co. vs. Norfolk, etc., Ry. Co.*, 228 *U. S.*, 596.

The learned Solicitor-General relies with great confidence on *Snyder vs. Marks*, 109 *U. S.*, 189; but that case has no application or weight as authority in cases where an act of Congress levying a tax is claimed to be unconstitutional, and the act makes the tax a lien on real estate, and equity jurisdiction is invoked to prevent or remove the lien.

In that case an injunction was sought to enjoin a distraint of personal property; there was no allegation that the plaintiff had any real estate and there was no prayer for injunctive relief to prevent or remove a lien on real estate.

The case made by the bill was that of a tax which was erroneous but not void, and the opinion of the Court by Justice Blatchford must be confined to the case before the Court.

If it was intended to give the opinion a wider meaning, it was qualified and restricted to the case then decided, by the subsequent decisions and judgments of the Court in *Union Pacific Ry. Co. vs. Ryan, Marshal of Cheyenne*, 113 *U. S.*, 516; *Wilson vs. Lambert*, 168 *U. S.*, 611, and *Ohio Tax Cases*, 232 *U. S.*, 576, 587.

III.

Instead of dismissing the appeal the case should be retained and be decided on the merits; and the jurisdiction of the Supreme Court of the District of Columbia, on the case made by the bill, to grant injunctive relief, sustained.

The opinion of the Court by Justice Blatchford in *Snyder vs. Marks*, 109 *U. S.*, 189, cites approvingly the following cases in the Circuit Courts of the United States.

Howland vs. Soule, Deady 413.
Pullan vs. Kinsinger, 2 *Abbott U. S.*, 94.
Robbins vs. Freeland, 14 *Int. Rev., Rec.* 28.
Delaware R. R. Co. vs. Prettyman, 17 *Id.*, 99.
United States vs. Black, 11 *Blatchford*, 538, 543.
Kissinger vs. Bean, 7 *Bissell*, 60.
United States vs. Pacific Railroad, 4 *Dillon*, 66, 69.
Alkan vs. Bean, 23 *Int. Rev., Rec.* 351.
Kensett vs. Sivers, 18 *Blatchford*, 397.

In not one of these cases was the jurisdiction of the Court invoked to prevent or remove a lien on real estate; the injunction sought was to restrain a distraint of personal property; and the facts on which the tax was claimed to be illegal were within the authority and jurisdiction of the assessing officer, to determine.

Nowhere was it held that Section 3224 applies to tax assessments not within the authority or jurisdiction of the assessing officer; and in *Philadelphia and Reading R. R. vs. Barnes, Collector*, 12 *Int. Rev., Rec.* 112, Justice Strong, at the circuit, held in a case where an income tax law had expired, that the assessor had no authority to assess the tax, on dividends payable thereafter.

A distraint of personal property had been made, and the railroad company brought an action of trespass against the collector and his deputies, who pleaded the levy of the tax in justification.

Justice Strong held that the income tax law in question expired December 31, 1869, and a dividend payable thereafter was not subject to the tax.

His opinion concludes:

> "It follows that the assessor was without authority to assess a tax upon it, and that the plea of the defendants does not justify the distress they made to enforce its payment by the plaintiffs together with the payment of a 5 per cent additional penalty."

The appellants are willing that this case be submitted with *Dodge vs. Brady, No.* 213, which is on the call as an advanced case for October 12, 1915, or that it be submitted at that time on briefs.

FRED A. BAKER,
Counsel for Appellants.

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No. 396.

In the Supreme Court of the United States.

October Term, 1915.

JOHN F. DODGE AND HORACE E. DODGE,
APPELLANTS,
v.
WILLIAM H. OSBORN, COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION BY APPELLEE TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1915

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

JOHN F. DODGE AND HORACE E. DODGE, appellants, *v.* WILLIAM H. OSBORN, COMMISSIONER OF Interna. Revenue. } No. 396.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION BY APPELLEE TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT.

Comes now the Solicitor General, appearing in behalf of the appellee, and moves the court to dismiss or affirm the above-entitled cause.

STATEMENT.

Appellants filed in the Supreme Court of the District of Columbia a bill in equity praying for an injunction to restrain the Commissioner of Internal Revenue from assessing and collecting from appellants surtaxes under the provisions of the Income Tax Act of October 3, 1913, 38 Stat. 114, 166, on the ground,

inter alia, that subdivision 2 of division A of Section II of said act is unconstitutional.

The Commissioner filed a motion to dismiss the bill of complaint, asserting:

1. That the suit is brought for the purpose of restraining the assessment and collection of a tax of the United States, and as such can not be maintained.

2. That appellants have a plain, adequate, and complete remedy at law.

The motion to dismiss was granted and decree entered accordingly, from which an appeal was taken to the Court of Appeals of the District of Columbia, which affirmed the decree of the lower court (R. 27, 30).

Counsel for appellants make twelve assignments of error, but the only assignment requiring notice in this motion is No. 8, which is as follows (R. 25):

> The court erred in holding that section 3224 of the Revised Statutes of the United States providing, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" applies to the case of the plaintiffs (appellants).

ARGUMENT.

For the purpose of this motion it is deemed unnecessary to go into an exhaustive discussion of the propositions involved.

The Court of Appeals held:

1. That Congress has provided a complete and adequate remedy at law open to all persons aggrieved by the collection of an erroneous or illegal revenue tax.

2. That section 3224 of the Revised Statutes applies to cases of this character.

The court therefore found it unnecessary to pass upon the constitutional objections to the validity of the Income Tax Law.

It is submitted that this holding finds ample support in the case of *Snyder* v. *Marks*, 109 U. S. 189, 194, wherein section 3224 is elaborately discussed, and to which case the Court of Appeals refers in its opinion (R. 29).

Further the Income Tax Law expressly makes applicable to its provisions all laws in relation to the assessment, remission, collection, etc., of internal revenue taxes not specifically repealed thereby and not inconsistent with the provisions of Section II thereof, by paragraph "L," 38 Stat. 179, which is as follows:

> That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed.

Section 3224 has not been repealed, nor is there anything to be found in the Income Tax Law indicating either its repeal or amendment.

In so far as the constitutional objections raised in this case are concerned, the same questions will be

found in the case of *John F. Dodge and Horace E. Dodge* v. *James J. Brady, Collector of Internal Revenue*, No. 213 of this term, advanced for argument on October 12, 1915.

It is submitted that either this appeal should be dismissed or the judgment of the Court of Appeals affirmed.

JOHN W. DAVIS,
Solicitor General.

SEPTEMBER, 1915.

○

No. 397

see

No. 354.